Supreme Court, U.S.
FILED
941280 JAN 25 1995
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CHARLES R. WILLMAN, M.D.,
Petitioner,

v.

HEARTLAND HOSPITAL EAST, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the application of federal antitrust laws and summary judgment standards to medical peer review. In a peer review, direct competitors of Petitioner, Charles R. Willman, M.D., determined his medical care to be substandard. They revoked his hospital privileges thereby excluding him from the practice of surgery at the only hospitals in the relevant market. In opposition to a motion for summary judgment, Dr. Willman presented substantial evidence disputing the legitimacy of the peer review and its conclusion that he gave substandard care. He presented economist's testimony that his exclusion, if unjustified on health care grounds, was anticompetitive and unreasonable. The district court granted summary judgment against him and the Eighth Circuit affirmed. The questions presented are:

I

Whether, under the Sherman Act, an appropriate Rule of Reason analysis requires resolution of the issue of the physician's competence or does the court's deference to the disputed peer review findings of competitors satisfy the Rule.

II

Whether, under *Matsushita* and *Kodak*, an unlawful conspiracy can reasonably be inferred from evidence that a physician was excluded after peer review by competitors who employed flawed methodologies and procedures, exceeded their authority, presented deceptive evidence, reached disputed medical conclusions, and imposed unreasonable sanctions.

LIST OF PARTIES

The Petitioner is:

Charles R. Willman, M.D.

The Respondents are:

Heartland Hospital East
Heartland Hospital West
Heartland Health System, Inc.
Richard Craig, M.D.
Ernest Weinand, M.D.
Edward Beheler, M.D.
Edward Andres, M.D.
James McMillen, M.D.
Robert Stuber, M.D.
Orlyn Lockard, Jr., M.D.
Charles Mullican, M.D.
Wallace McDonald, M.D.
Steven C. Krueger, M.D.

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Charles R. Willman, M.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. A, A1, is reported at 34 F.3d 605. The opinion of the district court, App. B, A16, is reported at 836 F.Supp. 1522.

JURISDICTION

The court of appeals entered its judgment on August 29, 1994, App. A, A1. On November 21, 1994, this Court extended the

time for filing a petition for a writ of certiorari to and including January 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are 15 U.S.C. §§1, 2 and 15. They are set out in relevant part at App. C, A39.

STATEMENT OF THE CASE

A. The Parties And The Market Setting.

Charles R. Willman, M.D., F.A.C.S., is a board certified general surgeon who practiced surgery and medicine in St. Joseph, Missouri without restriction until 1981.[1] As the result of a series of peer review actions instigated in 1982 and pursued to completion in 1985 by rival physicians under the leadership of respondents, Dr. Willman lost his privileges at both St. Joseph area hospitals to admit patients or perform surgery.

The loss of his hospital privileges excluded him from the relevant service market of general surgical services in the St. Joseph, Missouri area, the relevant geographic market.[2] Only four board-certified general surgeons remained in the market after Dr. Willman's exclusion. His loss of privileges also excluded him as a competitor in other medical service markets such as internal medicine/family practice, urological and gynecological surgery and endoscopy.

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[1] Dr. Willman is duly licensed in Missouri as a physician. He has practiced in St. Joseph, Missouri his entire career. He is a graduate of Washington University School of Medicine, St. Louis; interned at St. Luke's Hospital, St. Louis; and completed a four-year residency in general surgery at Henry Ford Hospital, Detroit. He has served as chief of staff and in other positions of responsibility at the St. Joseph area hospitals.

[2] The St. Joseph area geographic market consists of the Missouri counties of Andrew and Buchanan and the Kansas county of Doniphan.

Dr. William G. Shepherd, a distinguished professor of economics, testified that if Dr. Willman was in fact affording his patients treatment at a medically acceptable level of quality, then his exclusion from the only hospitals in the geographic market had an adverse impact on competition in the general surgical services market. He also testified that the respondent hospitals, at least since their merger in 1984, had a monopoly in the market for acute hospital care services[3] and were facilities essential for a general surgeon to compete effectively in the relevant product and geographic markets.[4]

Four expert medical witnesses gave depositions on Dr. Willman's behalf. Drs. Jewell and Dunn, Kansas University Medical Center, and Dr. Roper, Washington University Medical Center, are distinguished professors of medicine. Dr. Miller is a Kansas City area board certified gynecologist. Each testified that Dr. Willman's care of his patients met acceptable medical standards.[5] Respondents presented evidence to the contrary in the form of their own peer review conclusions and the testimony of experts retained for trial.

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[3] The respondent hospitals were independent, sectarian institutions until 1984. These previously competitive hospitals acquired monopoly power in the St. Joseph area market in 1984 when they came under common ownership of Respondent Heartland Health Systems, Inc. Almost 90% of the hospitalizations of persons living in the market were provided by Heartland Health Systems, Inc.

Heartland Health Systems, Inc. and an organization of local doctors are currently under scrutiny of the Antitrust Division, U.S. Department of Justice for alleged monopolization, market allocation, and market foreclosure. *See* Kansas City Star, Dec. 8, 1994, at B1; St. Joseph News-Press, Dec. 9, 1994 at 1B.

[4] In addition to having a monopoly over acute hospital care, the respondent hospitals controlled access to the only surgical suites in the market -- facilities that are essential for competition in the market for general surgical services.

[5] Dr. Miller testified that Dr. Willman's treatment of certain gynecological patients met, but did not surpass, minimally acceptable standards.

The respondent physicians include the four board-certified general surgeons and six other doctors with whom Dr. Willman competed. Because of the breadth of his training, Dr. Willman competed to a certain extent with other specialists. For example, he competed for surgical patients with gynecologists and urologists by providing routine gynecological and female urological surgery services for which he was trained during his residency. Dr. Willman also offered diagnostic endoscopy services and facilities as part of his general surgical services.[6] For these services he competed with the hospitals and respondent Lockard who for a time was the only gastroenterologist in the area.

Dr. Willman also provided primary care services in competition with internists and family practitioners. He offered these services as a means of developing a self-referral source of surgical patients after the primary care physicians in St. Joseph stopped referring him surgical patients. These referral sources dried up after Dr. Willman, in a bitter eleven year litigation, successfully sued his former partner, respondent Beheler, for breach of a non-competition agreement. That action created tremendous resentment and hostility towards Dr. Willman in the St. Joseph medical community.

Although competition for patients was fierce, Dr. Willman was very successful. In 1980-81, for example, he saw as many as 4,000-5,000 patients per year. In contrast to his competitors, including respondents, he charged lower prices, provided routine services free, gave personalized care, and accepted patients on welfare.

B. The Role of Competitors in Dr. Willman's Peer Review.

1. Background. Dr. Willman's competitors, on three occasions prior to 1982, attempted to use the hospital peer review

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[6] Endoscopy is a procedure employing a flexible fiberoptic instrument by which a physician can visualize virtually the entire gastrointestinal system. It is used for diagnostic purposes as well as certain general surgical operative procedures.

process to exclude him from their markets by restricting his privileges. In 1976, competing internists on the Credentials Committee at Methodist Medical Center (MMC) tried to restrict his privileges to treat medical patients.[7]

In 1981, the Chairman of the Quality Assurance (QA) Committee at St. Joseph Hospital (SJH) sought to limit Dr. Willman's endoscopy privileges. The business partner of that committee chairman was respondent Lockard, a gastroenterologist and at the time the only other doctor in St. Joseph performing diagnostic endoscopies.

In October, 1981, competing gynecological surgeons on the SJH QA Committee asked the hospital to limit Willman's privileges to perform routine gynecological surgery.[8]

2. *The Initial Events.* The immediate events of this case began in February, 1982 when Dr. Willman successfully treated Bobby Fanning, a young man suffering a self-inflicted gunshot wound to the chest. His successful, early morning emergency room treatment was marred by the inability of the emergency room nurse to find a chest tube of the size called for by Dr. Willman. Subsequently and before even examining the patient, respondents Andres, Craig and Beheler, each a competing general surgeon, criticized the size and placement of the chest tube and Dr. Willman's care of the patient. They caused the administrator of MMC to convene a meeting of the Critical Care Committee

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[7] Methodist Medical Center (MMC) became Heartland Hospital West (HHW). St. Joseph's Hospital (SJH) became Heartland Hospital East (HHE). The name changes occurred in 1984 when the hospitals came under the common ownership.

[8] The use of peer review to restrict competition was not restricted to Dr. Willman. In 1980, the SJH Credentials Committee refused to credential a general surgeon seeking privileges to perform routine gynecological surgery for the reason that there were enough gynecologists already providing those services.

(CCC). That committee included respondents and other competitors, including respondent Beheler, the defendant in the rancorous 11 year litigation with Dr. Willman previously discussed.

At the urging of the three general surgeons, the CCC decided that Dr. Willman should relinquish care of the patient. Respondent Craig ordered Dr. Willman to turn care of his patient over to respondent Beheler or face immediate suspension. The patient's parents refused Beheler. Before examining the patient, Craig told the Fannings their son needed immediate chest surgery to correct a life-threatening condition. The parents then let Craig examine their son. Craig examined Fanning, made no significant change in Dr. Willman's treatment regime, and concluded that the patient was neither critical nor in need of immediate surgery. Subsequently, the patient was transferred to a Kansas City hospital where he underwent elective surgery.

Dr. Roper, a professor of thoracic surgery at Washington University in St. Louis, gave evidence that Willman's treatment of Fanning met acceptable medical standards. The defendants' expert, of course, disagreed.

Shortly after this incident, Allison, Administrator of MMC wrote:

> I have continued to stay in close contact with Dr. Richard Craig and Dr. Stuber regarding this matter. At this point it is uncertain what Dr. Willman's next step will be. *It does appear that there is complete support from the Medical Staff and the boards of both hospitals to pursue this as far as Dr. Willman would so desire.* (emphasis added)

In the same period, Dr. Willman overheard Beheler tell another doctor that they [the CCC] had "humiliated" Willman and that they were watching him to find other incidents which they could use against him. At another time, Beheler told a

hospital administrator "by the time I'm through with [Willman], he'll be bankrupt."

3. The Peer Review at Methodist Hospital. In early March, 1982, Dr. Willman found posted on a public bulletin board confidential minutes of the CCC criticizing his care of Fanning and recommending a review of his last 60 cases "with the idea of possibly having his privileges reduced or banned from practicing at this hospital."

Acting on this recommendation, the Medical Executive Committee (MEC) commenced an unannounced review of Dr. Willman's closed cases for 1981 and 1982. These reviews culminated in a finding by the MEC on January 18, 1983 that Willman's treatment of a number of patients fell below their standards. Eight of the thirteen participants in that meeting were competitors of Dr. Willman.

On January 24, 1983 the Executive Committee of the Board of Trustees recommended to the MEC that Dr. Willman submit to corrective actions, such as increased scrutiny of his charts and mandatory consultations. That recommendation was never carried out by the MEC.

The MEC, instead, convened an executive session on February 1, 1983 and suspended Dr. Willman's privileges effective immediately. Nine of thirteen participants in that meeting were competitors of Dr. Willman, including the Chief of Staff and Committee Chairperson, respondent McMillen.

The MEC had no authority unilaterally to suspend Willman effective immediately. McMillen tried to justify the action by citing a by-law provision that allowed the MEC and an Administrator jointly to suspend a physician in an emergency if re-

quired for immediate patient safety.[9] Since Dr. Willman had no acute care patients in the hospital at the time, no emergency could exist.

Four months later, when the MEC afforded Dr. Willman a hearing on his suspension, eleven of seventeen committee members participating were his competitors. Nine had taken part in the earlier meeting where his immediate suspension was approved. The hearing continued until 4:00 a.m., causing Dr. Willman's experts to leave without testifying because each had his own patient care obligations. The Committee would not adjourn and reconvene at a time more convenient for these witnesses. When the proceeding concluded, Dr. Willman's suspension remained in effect. Dr. Willman's experts would have given evidence (as they would have at trial) that the quality of Dr. Willman's care was acceptable.

In December, 1983 at the conclusion of his suspension, Dr. Willman reapplied for privileges at MMC. His application was sent to a newly-created committee, whose three members included respondents Craig and Andres.[10] The "Committee" recommended against Willman's application. Craig, as Chairman, also laid out conditions under which Dr. Willman's privileges might be restored. One condition was that Willman accept

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[9] Under the By-laws of both hospitals, revocation of a physician's privileges required two elements: (i) a recommendation from the medical staff, and (ii) action by the governing body. Neither medical staff had authority to act unilaterally nor did the boards. The By-laws of both hospitals also provided for summary suspension of a physician whenever *immediate* action was required in the interest of patient safety or care. The chief of staff with concurrence of the hospital administrator had the authority to suspend summarily for patient safety in an emergency, but no authority to revoke privileges.

[10] Craig, the chief of surgery, and Andres were the general surgeons who instigated the Fanning incident. *See* part B.,2., *supra.*

only surgical patients on referral like the other general surgeons.[11]

The Credentials Committee, with three competitors out of five members, the MEC, with eight competitors out of fourteen and, eventually, the MMC Board of Trustees followed Craig's and Andres' recommendation and ratified the refusal of his application.

4. The St. Joseph Hospital Peer Review. In Fall 1982, SJH began a series of investigations and committee actions that overlapped those being taken at MMC.[12] Respondent Weinand, a competing general surgeon, the Chief of Staff and Chairman of the MEC, appointed a special sub-committee to evaluate Dr. Willman's 1981 and 1982 charts. Three respondents (Weinand, Mullican, a competing internist, Lockard, a competing gastroenterologist) and Dr. Marston, a competing gynecological surgeon, comprised the committee.

Using the Methodist Hospital incident involving patient Fanning, the MEC took corrective action against Dr. Willman. Eight of nine committee participants were his competitors. At a hearing held to review the MEC's decision, Weinand, who appointed the hearing panel,[13] presented deceptive testimony about Fanning's condition and the recognized methods of treatment as set forth in standard surgical texts and the current medical literature. This was not the only occasion during the

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[11] More than once, other physicians suggested that Dr. Willman's primary care practice was at the root of his problems.

[12] Most physicians in the market had staff privileges at each hospital.

[13] One hearing officer was a doctor employed by respondents McMillen, Krueger and Stuber, each of whom had played a significant role in Willman's loss of privileges at MMC or in the Fanning incident. The latter two had voted for the action being reviewed. Another was a doctor employed by respondent Mullican, one of the special sub-committee members reviewing Dr. Willman's 1980 and 1981 charts.

peer reviews that one of the respondents used questionable medical evidence.[14]

At the April, 1983 meeting of the MEC, Dr. Weinand's special sub-committee reported on its review of Dr. Willman's closed cases. The MEC determined on the basis of that report to take corrective action against Dr. Willman. Ten of eleven participants were competitors of Dr. Willman.

On May 31 and June 7, 1983, the MEC held a hearing on the charges. Among other things, Weinand presented three statistical "audits" showing that Dr. Willman's post-operative infection, readmission and incisional hernia rates compared unfavorably with other doctors. Discovery revealed that the underlying data on which those audits were based was inaccurate or unreliable. At the conclusion of the hearing on June 7, 1983, the MEC revoked Dr. Willman's privileges effective immediately.

The MEC's unilateral action was unauthorized by hospital bylaws. Since the MEC had been contemplating its action for a lengthy period, it made no effort to claim or prove that an emergency existed.

The summary suspension of Dr. Willman by the MEC at MMC on February 1, 1983 and immediate revocation of his privileges by the MEC at SJH on June 7, 1983 exceeded the authority of each medical staff because i) each MEC acted

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[14] Weinand selectively edited quotes from standard surgical texts to include information favorable to his position while omitting crucial information favorable to Dr. Willman, particularly information that controversy surrounded the recommended treatment for such injuries. On other occasions Andres withheld evidence that there was substantial disagreement among surgeons, as disclosed by the medical literature, as to the proper treatment of a chest wound such as Fanning's. Each time Krueger testified, he reported a higher volume of residual material in Fanning's chest from the time before and misdescribed it as blood. There were other similar incidents involving other doctors.

unilaterally and ii) no emergency existed. Each action was done publicly, made effective immediately, bore the professional endorsement of the leaders of staff, and usurped the authority of hospital boards. Because of each boards' legitimate concerns over "corporate negligence," according to the evidence, the MECs' *fait accompli* effectively precluded either board from reinstating Willman, no matter how unwarranted the MEC's actions happened to be.

5. Dr. Willman's Attempts to Regain Privileges. In December, 1983, after being without hospital privileges since the previous June, Dr. Willman filed a mandamus action against SJH seeking restoration of his privileges. The circuit court entered a preliminary writ that enabled Dr. Willman to practice at SJH for fourteen months. Dr. Willman practiced at SJH without any complaint from other doctors, any staff committee or any patient. In March 1985 an appellate court vacated the writ and remanded with instructions to dismiss. Immediately upon learning the writ was vacated, SJH refused Willman access to the hospital.

Once again without hospital privileges, Willman, in March 1985, made application to MMC and SJH, which by this time were under common ownership.

Dr. Willman's application to Heartland Hospital East (HHE), formerly SJH, was referred first to the Surgical Credentials Committee. There three physicians, two of whom were his competitors, recommended denial of his application because he had not presented evidence of recent training and experience. The Committee gave no consideration to his 14 months of complaint-free practice. On August 19, 1985, the MEC, consisting of six competitors out of nine participants, followed that recommendation. Two days later, the Departments of Surgery of the hospitals held a joint meeting. A majority of the attendees were Willman's competitors. They also followed that recommendation.

At Willman's request, HHE convened an Ad Hoc Committee in early October, 1985 to review the MEC's action. The chairman of the hearing panel was a gynecological surgeon in direct competition with Willman. The other two members were internists also in direct competition with him for primary care patients. This panel also refused Dr. Willman's request to consider the hospital's own records of his 14 months of practice on the technical ground that he had the burden of producing the hospital's own records to its staff committees. That "ruling" was made by the chairman of the hearing panel on the advice of the hospital's attorney.[15] The MEC confirmed the action of the Ad Hoc Committee in October, 1985. Of eleven participants, seven were Dr. Willman's competitors.

At Heartland Hospital West (HHW), formerly MMC, the pattern of events was similar. A four person credentials committee that included respondent Weinand and two other competitors, voted to deny the application for reasons identical to those stated at HHE. The MEC adopted that decision in September, 1985. Of fourteen participants, eight were his competitors. In November, 1985, an Ad Hoc Hearing was convened at Dr. Willman's request. Of the nine members of the panel, six were his competitors and three were employees of respondents. None of these committees was willing to consider Dr. Willman's 14 months of complaint-free service as evidence of his medical qualifications.

6. The Evidence of Flawed Peer Review Proceedings. Dr. Willman presented testimony of a peer review expert that the refusal of the staffs to consider his 14 months of practice at HHE as evidence of his qualifications when considering his 1985 applications was indefensible as a medical matter and highly

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[15] The chairman already had access to and knowledge of Dr. Willman's surgical cases because he was also a member of the Surgical Case Review Committee whose routine function was to review the surgical cases of all doctors.

questionable as a legitimate interpretation of the by-laws. Without that data the hospital boards had little basis upon which to review the MEC's action had the Board possessed such independent capability, which it did not.[16]

Dr. Waite, the peer review expert, testified that both medical staffs conducted flawed and biased peer reviews throughout. The presence of competitors on key committees serving as both witnesses and judges was a particularly obvious shortcoming, but far from the only one. The type of review conducted, namely chart-based, was also flawed. A chart-based peer review is one based on closed patient charts. It cannot be conducted fairly, absent pre-existing, written standards of practice against which to measure a physician's actions. Neither hospital had such standards.

In the absence of standards, chart-based peer review, Dr. Waite testified, is wholly subjective, reflecting nothing more than the personal opinion of the reviewer, and is unreliable. Such reviews have little or no impact on patient safety or well-being. They are concerned chiefly with corrective action against the physician. Only concurrent or prospective reviews have any impact on quality of current patient care.

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[16] Hospital boards typically rely on their medical staffs for judgments about the quality of care in specific clinical situations. Evidence from a former Heartland administrator, two experts, and board resolutions establish that, while the hospital boards here exercised *de jure* decision-making authority on medical and credentialing matters, they were, *de facto*, dependent on the judgment of the medical staff in such matters. The hospital boards here were chiefly laypersons incapable of independently reviewing the judgments of the medical staff on medical issues or the qualifications of physicians. In fact, those boards always acquiesced in the judgment of the staff on such matters. While they examined peer review decisions to see whether the staff had followed prescribed procedures, they did not review the staff's professional judgments. Even the board's resolutions recite reliance on the judgments of the medical staff in arriving at their decisions on Dr. Willman.

Respondents imposed the severest possible sanctions on Dr. Willman, making it impossible for him to obtain hospital privileges elsewhere, although he has tried. Petitioner's peer review expert and his economist agreed that the respondents' sanctions were excessive, as compared to corrective action (or the lack thereof) meted out to other similarly situated physicians, and that other less restrictive means were available to respondents which would have satisfied legitimate health care quality goals.

Dr. Willman, on more than one occasion, indicated his acceptance of restrictions on his practice such as mandatory consultations and more frequent and comprehensive reviews of his active charts in order to regain hospital access. Respondents rejected these blandishments on various pretexts.

C. Course of Proceedings and Disposition Below.

At the conclusion of discovery, the respondents filed their motions for summary judgment. Petitioner filed its opposition accompanied by an appendix of approximately four to six thousand pages documenting the disputed facts. On October 19, 1993, the district court granted their motions, entered judgments for respondents on the §§1 and 2 Sherman Act claims and, declining to exercise supplemental jurisdiction, dismissed the remaining state law claims without prejudice. The opinion of the district court is set forth in Appendix B, A16.

On August 29, 1994, a panel of the Eighth Circuit Court of Appeals affirmed the district court. App. A, A1. While accepting "that the evidence creates a genuine issue as to whether the peer reviewers reached the wrong result, and, as a consequence, removed a qualified physician," the Court did not agree "that this factual issue precludes summary judgment." App. A, A8. The essence of the Court's reasoning is embodied in its holding that,

> An antitrust action is not the proper forum in which to evaluate a physician's competence. [citations omitted] . . . whether Willman actually provided substandard care is not

> the proper question. Rather, we must decide whether Willman's peer reviewers could have reasonably concluded that he provided substandard care." App. A, 8-9.

Citing *Johnson v. Nyack Hosp.*, 964 F.2d 116, 121 (2d Cir. 1992)[17], the Court concluded that corrective action against a physician does not violate the antitrust laws provided the physician's peer reviewers had legitimate medical reasons to believe that the physician provided substandard care. Only where the peer group's conclusions are "so baseless that no reasonable medical practitioners could have reached these conclusions after reviewing the same set of facts would the Eighth Circuit permit an inference of conspiracy. *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 821 (11th Cir. 1988) (subsequent history omitted)." App. A, A10.

The Court did not discuss the expert economic testimony that Dr. Willman's exclusion adversely impacted competition in the relevant market or that such impact was reasonable *only* if Dr. Willman rendered substandard care.

Since there were conflicting medical opinions regarding the acceptability of Willman's care, the Court found his exclusion from the hospital to be as consistent with the lawful motive of promoting quality patient care as with an anticompetitive motive. App. A, A10. Such conduct, without more, the court held, does not give rise to an inference of conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993).

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[17] The Eighth Circuit misread *Johnson*. The *Johnson* Court found that a determination of a physician's competence was the dispositive issue in gauging the anticompetitive effects of a peer review action. 964 F.2d at 121. The *Johnson* Court, citing the doctrine of primary jurisdiction, concluded that such a determination should be made in the first instance by the appropriate state health care agency as provided by New York law. *Id.* at 122-23.

The Court considered but rejected Dr. Willman's contention that the record contains evidence from which to infer an antitrust conspiracy. The Court accepted the proposition that Dr. Willman's competitors "participated at every stage of the peer review process." However, it found "no evidence that the competitors acted in concert to pursue an unlawful motive." App. A, A11. The Court made no reference to or comment about Dr. Willman's countervailing evidence that respondents manipulated the evidence and proceedings to Dr. Willman's disadvantage as set forth at parts A and B, *supra*.

The Court further held that Dr. Willman presented no evidence to dispute the respondents' affidavits that the hospital boards, not the competing physicians, had the authority to make the final determination concerning Dr. Willman's privileges. The Court made no reference to or comment about countervailing evidence he presented that the hospital boards composed largely of laymen were incapable of independently assessing medical opinions of the staff. Consequently, the boards always deferred to the staff's decision as they did in this instance. *See* n. 16, *supra*.

REASONS FOR GRANTING THE WRIT

In direct conflict with recent decisions of this Court and another Court of Appeals, the Eighth Circuit held that Sherman Act challenges to medical peer reviews should not be subjected to a typical Rule of Reason analysis. Rather than weigh the competitive effects of the peer review decision, the Appeals Court found that the reviewers reasonably could have determined that Dr. Willman provided unacceptable care and that no reasonable inference of antitrust conspiracy could be drawn from evidence that his exclusion resulted from a sham peer review conducted by his competitors.

The Eighth Circuit opinion effectively exempts medical peer review, regardless of its circumstances or effects, from antitrust scrutiny and relieves hospitals and physician-reviewers from the well-settled requirements of Federal Rule of Civil Procedure 56 when seeking a summary judgment. If not reviewed and reversed by this Court, the Eighth Circuit's decision will erode this Court's century-long admonition that courts should not create common law exemptions to the antitrust laws and its recent reaffirmation in *Eastman Kodak v. Image Technical Services* that normal summary judgment rules apply to antitrust cases.

Peer review, the process by which physicians and hospitals evaluate and discipline staff doctors, has become an integral component of our health care system. Peer review is mandated by the laws of most states and by federal Medicare and Medicaid regulations. The consequences to a doctor of an adverse peer review by even one hospital could be "tantamount to excluding a doctor from the profession as a whole." Blumstein & Sloan, *Antitrust and Hospital Peer Review*, 51 Law & Contemp. Probs. 7, 52-53 (Spring 1988).

The consequences of the Eighth Circuit's decision extend far beyond the destruction of Dr. Willman's professional life by a competitor-driven peer review. The Court of Appeals' decision

that peer review is exempt from well-established Rule of Reason principles and equally well-settled summary judgment standards threatens an important safeguard of competition in the medical services industry. Congress has recognized the importance of continued antitrust scrutiny of peer review in the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101-11152.[18] The Act provides peer reviewers limited immunity from antitrust damages, but only if the peer review is conducted by those "not in direct economic competition with the physician involved." *Id.* at §11112(b)(3)(A)(iii).

I. The Court Of Appeals' Refusal to Apply the Rule of Reason To Peer Review Directly Conflicts With Decisions Of This Court And Other Courts Of Appeals.

The Eighth Circuit decided this case from its perspective that "[a]n antitrust action is not the proper forum in which to evaluate a physician's competence." App. A, A9. This Court has come to the opposite conclusion in *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991) and *Patrick v. Burget*, 486 U.S. 94 (1986). Similarly, the Court has admonished lower courts not to create common law exemptions from the antitrust laws. *See, e.g., National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378, 388-89 (1981).

In *Patrick*, this Court specifically rejected the notion that application of the federal antitrust laws would thwart effective peer review saying, "this argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such as it is properly addressed to the legislature." 486 U.S. at 105. In so holding the Court made quite clear that the full scope of the antitrust laws applies to medical care issues such as peer review proceedings.

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[18] The Act was enacted after the events at issue in this case and is not retroactive.

The Eighth Circuit's refusal to subject peer review to conventional antitrust analysis under the Rule of Reason is in direct conflict with the decisions of this Court. Rather than weighing the reasonableness of the impact on competition of a physician's peer review exclusion, the Eighth Circuit deferred to and accepted the peer reviewers' disputed findings of unsatisfactory care and held immaterial whether Dr. Willman in fact provided acceptable medical treatment. App. A, A8-9. This approach fails to consider whether the peer review was a pretext to stifle competition.

The Rule of Reason requires more. In the case of peer review, the anticompetitive effect of a physician's exclusion cannot be determined without an assessment of the quality of that physician's care. As Petitioner's economist testified, if Dr. Willman was providing acceptable care then his exclusion from the relevant market had an adverse impact on competition. His exclusion could be procompetitive only if he was providing unacceptable care and his exclusion was the least restrictive means to correct that situation.

Such an analysis is mandated by this Court's many Rule of Reason decisions. At its essence, the Rule of Reason inquiry is whether the challenged acts are "unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *accord National Society of Professional Engineers v. United States*, 435 U.S. 679, 690-92 (1978). A Rule of Reason analysis requires "the fact finder [to weigh] all of the circumstances of a case." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of

the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress." *Professional Engineers*, 435 U.S. at 692.

The Third Circuit applied the Rule of Reason to medical peer review in a decision that plainly conflicts with the Eighth Circuit's opinion in *Willman*. In *Miller v. Indiana Hospital*, 843 F.2d 139, *cert. denied*, 488 U.S. 870 (1988), the Third Circuit reversed a district court which held that "in order for a plaintiff physician to withstand summary judgment in an action arising out of a hospital's decision to terminate the physician's staff privileges, 'the plaintiff must demonstrate on the basis of the record before the hospital at the time of its decision, that the hospital lacked substantial evidence in support of its ultimate decision.'" 843 F.2d at 142. The Third Circuit stated that the district court's application of this "substantial evidence" test "effectively eliminates any application of the antitrust laws to [the reviewers'] actions. *Id.* at 143.

The *Willman* Court completely misapplied the Rule of Reason by sidestepping the issue of Dr. Willman's competence, even though the court conceded a dispute on that issue. Instead of determining whether the challenged peer review was anticompetitive because it excluded a competent physician-competitor, the Appeals Court disregarded the inquiry finding "it would not have been unreasonable for Willman's peer reviewers to have doubts about the quality of Willman's patient care" App. A, A9.

To justify its Sherman Act analysis, the Eighth Circuit relied on *Johnson v. Nyack Hospital*, 964 F.2d 116 (2d Cir. 1992). But rather than supporting *Willman*'s approach to the Rule of Reason, the *Johnson* decision confirms that "[w]hether defendants had a proper medical reason for terminating Johnson's privileges will be dispositive of his antitrust claims." 964 F.2d at 121. That question required an "evaluation of whether Johnson provided inadequate treatment to Nyack's patients." *Id.* at 122.

As a result of the denial of staff privileges to Dr. Willman, he cannot practice his specialty in the St. Joseph market or anywhere else because no hospital will grant him staff privileges. Indeed, the record shows that he was denied staff privileges at other hospitals outside the St. Joseph area. No one questions that the denial of staff privileges is tantamount to permanent exclusion from the market place. The Third Circuit in both *Weiss v. York Hospital*, 745 F.2d 786 (1984), *cert. denied*, 470 U.S. 1060 (1985) and *Miller* has made this clear.[19] The *Miller* Court noted that the absence of staff privileges is devastating to a physician such as a surgeon who depends to such a large degree on the technology and equipment found only in a hospital setting." 843 F.2d at 141 n.2.

Instead of the Rule of Reason analysis required by the Sherman Act, the *Willman* Court chose to apply the "substantial evidence test" rejected by *Miller*. As a consequence of accepting without further examination what the respondent peer reviewers could reasonably have concluded, the Appeals Court made no antitrust analysis at all. The Eighth Circuit's flawed approach denies physicians and patients alike the protection of the Sherman Act and increases the risk that competitors will use peer review as a pretext to eliminate their rivals. Medical competence or lack thereof is the touchstone by which the competitive impact of peer review exclusion must be measured. By refusing to accept this fundamental principle, the Appellate Court has retreated from the cardinal principle of antitrust analysis — the Rule of Reason — announced first by this Court in *Standard Oil* and reiterated and reaffirmed ever since.

Peer review can be either an effective means to guarantee quality health care or a devastating weapon in the hands of

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[19] *Accord Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 820 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990) ("a negative decision at one hospital could effect the decision at another hospital; therefore, as the commentators have noted, a negative decision by one hospital 'could be tantamount to excluding a doctor from the profession as a whole'").

doctors and hospitals who use it for anticompetitive reasons. This case presents the Court with a significant opportunity to preserve the laudable aspects of peer review by enforcing the Sherman Act's existing constraints on that process.

II. The Court Of Appeals' Disregard of the *Kodak* Decision and Rule 56 In An Antitrust Case Warrants Review.

The Eighth Circuit upheld the district court's grant of summary judgment by disregarding *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992) ("*Kodak*") and Fed.R.Civ.P. 56. Neither the Appellate Court nor the district court discussed the *Kodak* decision although that case and the issue of whether the evidence opposing summary judgment created a reasonable inference of conspiracy was squarely presented to both courts.

The Appeals Court acknowledged that whether Dr. Willman was a competent physician was in dispute. It also acknowledged that Dr. Willman presented evidence that his competitors participated at every stage of his peer review. App. A, A11. The Court omitted any mention of Dr. Willman's evidence that respondents used misleading evidence, disregarded by-laws, employed flawed methodologies, disregarded evidence of Dr. Willman's competence, and imposed unreasonable sanctions. Nevertheless, the Eighth Circuit found summary judgment appropriate based on its deference to and acceptance of the peer reviewers' disputed findings and its understanding that *Matsushita Electronic Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("Matsushita") requires more of an antitrust plaintiff than presenting evidence from which reasonable inferences can be drawn. App. A, A10.

In *Kodak*, the Court made clear that *Matsushita* did not introduce a special burden on plaintiffs facing summary judgment. *Kodak*, 112 S.Ct. at 2088. *Matsushita* "demands only that the non-moving party's inferences be reasonable in order to reach the jury." *Id.* at 2083. Further, *Matsushita* does not create

any presumption of summary judgment for the defendants. *Id.* at 2088.

Dr. Willman offered ample evidence from which reasonable inferences could be drawn as to the existence of a conspiracy, including that:

- Peer review is inherently concerted action and this instance was no exception.
- Willman's competitors dominated the peer review process; as such they had a rational economic motive to conspire.[20]
- The medical judgments reached were in dispute.
- Unreliable and misleading evidence was used in the peer review process; relevant evidence favorable to Dr. Willman was disregarded; by-laws and hospital board resolutions were disregarded.
- The peer reviewers applied flawed methodologies such as unwritten, discriminatory and subjective standards in terminating Dr. Willman for substandard practice; they failed to terminate similarly situated doctors.[21]

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[20] The involvement of competitors in excluding a rival from the market is sufficient evidence from which to infer a conspiracy. *See Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Bolt v. Halifax Medical Center*, 891 F.2d 810, 820 (11th Cir. 1988), *cert. denied*, 495 U.S. 924 (1990) ("One of the first principles of economics is the inverse relationship of supply to price. If doctors in a hospital can exclude other doctors from practicing in that hospital, then obviously the remaining doctors can charge a higher price for their services.") *Cf. Gibson v. Berryhill*, 411 U.S. 564 (1973).

[21] The Third Circuit in a number of cases has held that the application of discriminatory standards in the peer review process by the hospital and its medical staff *cannot* have a procompetitive effect. *Miller v. Indiana Hospital* 843 F.2d 139, 144 n.7, *cert. denied*, 488 U.S. 870 (1988); *Weiss v. York Hospital*, 745 F.2d 786, 821 n.60 (1984).

- The respondents failed to employ the least restrictive alternatives.[22] Instead, Dr. Willman was totally amd permanently excluded.

- Because Dr. Willman was a satisfactory physician his exclusion had an unreasonable anticompetitive impact.

Instead of affording Dr. Willman all reasonable inferences arising from his evidence of conspiracy, the Appellate Court reached the curious finding that Dr. Willman's evidence was insufficient to show a "motive" to commit an antitrust conspiracy.[23] App. A, A8-11. Such an inapposite approach is contrary to the settled rule that once the restraint is shown to be "facially anticompetitive", plaintiff has satisfied the requirements of the Sherman Act and made out a prima facie violation of that Act. *Kodak*, 112 S.Ct. at 2088. The exclusion of a competitor by rivals "is facially anticompetitive and exactly the harm the antitrust laws aim to prevent." *Id.*; *see United States v. Griffith*, 334 U.S. 100, 107 (1948); *ES Dev., Inc. v. RWM Enter.*, 939 F.2d 547, 555 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 1176 (1992) ("the exercise of veto power over a new franchise

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[22] *Wilk v. American Medical Association*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990); *see generally* Blumstein & Sloan, *Antitrust and Hospital Peer Review*, 51 Law & Contemp. Prob. 7, 75-76 (Spring 1988).

[23] This Court long ago established that proof of either an unlawful purpose *or* an anticompetitive effect is sufficient to establish a violation of the Sherman Act. In *United States v. Griffith*, 334 U.S. 100, 105-06 (1948), the Court stated that an intent to restrain trade need not be proved. If the restraint flows from the natural consequences of the acts, the required causal nexus is present to establish a violation. In recent years, the Supreme Court has reaffirmed Griffith's rationale as applied to different factual situations. *See, e.g., National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 101 n.23 (1984); *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980); and *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991). In this case, Dr. Willman presented evidence from an economist that his exclusion had an anticompetitive effect.

application by horizontal competitors constitutes a patently unreasonable restraint of trade."). In fact, respondents bore the "heavy burden" of competitively justifying their exclusion of Dr. Willman. *See National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 113 (1984).

The Eighth Circuit's failure to consider Dr. Willman's evidence of his competitors' involvement, their unjustifiable actions, and the anticompetitive effects of their acts also conflicts with the Third Circuit's opinion in *Miller v. Indiana Hospital*. There, evidence of a much less egregious nature was held to be sufficient to establish an antitrust conspiracy. The evidence in *Miller* was that: 1) the hearing process involved conflicts of interest; 2) the defendant hospital had concerns about competition from the plaintiff prior to concerns about plaintiff's competence; and 3) the defendants failed to terminate other doctors whose infractions were more serious than plaintiff's. 843 F.2d at 144. As the *Miller* Court noted, "Congress has given the jury the responsibility of resolving disputed fact issues." *Id.* at 143.

The legacy of *Matsushita* has been confusion about appropriate summary judgment standards. The Eighth Circuit, even after *Kodak*, failed to recognize that *Matsushita* only means that the inferences a party draws from evidence must be reasonable.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Dated: January 26, 1995.

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 93-3803

Charles R. Willman, M.D.,
Appellant,

v.

Heartland Hospital East; Heartland Hospital West;
Heartland Health System, Inc.; Richard Craig, M.D.;
Ernest Weinand, M.D.; Edward Beheler, M.D.;
Edward Andres, M.D.; James McMillen, M.D.;
Robert Stuber, M.D.; Orlyn Lockard, Jr., M.D.;
Charles Mullican, M.D.; Wallace McDonald, M.D.;
Steven C. Krueger, M.D.,
Appellees.

Submitted June 13, 1994

Decided Aug. 29, 1994

David Harlan, St. Louis, Mo. and Julian
von Kalinowski, Culver City, CA, argued
(David Streubel, St. Louis, Mo., on the brief),
for appellant.

George E. Leonard, Kansas City, Mo., argued
(William Quirk and Lisa Eckold, Kansas City, Mo.,
R. Dan Boulware and Mark Woodbury, St. Joseph, Mo.,
on the brief), for appellees.

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN,
Circuit Judge, and WELLFORD,* Senior Circuit Judge.

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* The Honorable Harry W. Wellford, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

WOLLMAN, Circuit Judge.

Charles R. Willman, M.D. appeals from the district court's[1] grant of summary judgment in favor of the defendants, Heartland Hospital East, Heartland Hospital West, and various physicians[2] in an antitrust action arising from Willman's loss of medical staff privileges. We affirm.

I.

Willman, a board-certified general surgeon, had medical staff privileges at Methodist Medical Center and St. Joseph Hospital, the two acute care hospitals in St. Joseph, Missouri. In 1983, the two hospitals affiliated under common ownership. In 1985, Methodist Medical Center became Heartland Hospital West and St. Joseph Hospital became Heartland Hospital East. In 1990, the two hospitals merged.

The events that eventually led to the revocation of Willman's privileges began on February 19, 1982, when Willman treated nineteen-year-old Bobby Fanning, who had been admitted to Methodist Medical Center for treatment of a gunshot wound to the chest. The head nurse of the Critical Care Unit as well as another nurse who had assisted in the treatment of Willman expressed concern to Drs. Stuber and Andres about Willman's treatment of Fanning. Because of the nurses' complaint, Methodist's administrator, Dr. Andres, and Dr. Beheler, a board-certified thoracic surgeon and Chairman of the Intensive Care Subcommittee of the Methodist Critical Care Committee, met to

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[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

[2] Willman named as defendants ten physicians who had staff privileges at one or both of the defendant hospitals. The defendant physicians are Andres, Beheler, Craig, and Weinand (general surgeons), Krueger, McDonald, McMillen, Mullican, and Stuber (internists), and Lockard (gastroenterologist).

discuss Willman's treatment of Fanning. Dr. Andres decided to contact Dr. Stuber, the Chairman of the Critical Care Committee. Dr. Stuber convened a special meeting of the committee, which concluded that Willman had mismanaged Fanning's treatment. After numerous hearings before various medical staff committees, the Board of Trustees of Methodist Medical Center voted unanimously by secret ballot in favor of a motion stating in part that

> the finding of the Medical Executive Committee, that Dr. Charles Willman's clinical care of Bobby J. Fanning . . . was clearly different from that of his peers and potentially harmful, was supported by substantial evidence; it is further resolved that the action of the Medical Executive Committee in requiring that Dr. Charles Willman be required to obtain immediate consultation from a Board Certified general surgeon and/or thoracic surgeon on all cases of chest trauma requiring hospitalization and conducting a retrospective review of the Doctor's hospitalization cases for the year 1981 was warranted, appropriate and necessary.

After reviewing Willman's 1981 hospital admissions, the Quality Assurance Committee referred to the Medical Executive Committee eight of the fifty-three cases reviewed. Although the Medical Executive Committee concluded that four cases "did not reflect reasonable clinical judgment about serious clinical data" and cited five cases as examples of Willman's "consistent pattern of deficiency in completion of discharge summaries, history and physical, surgical reports, and progress notes," the committee voted to defer any action pending review of Willman's 1982 cases. The Quality Assurance Committee reviewed Willman's 1982 cases and determined that thirteen of the forty-one cases contained deficiencies. After considering the Quality Assurance Committee's report on the 1982 cases, the Medical Executive Committee adopted a proposal to reprimand Willman, discuss the findings of the Quality Assurance Committee with

him, and conduct prospective periodic reviews of his hospital admissions. Willman, however, refused to discuss the proposal with the president of the medical staff. The Medical Executive Committee, therefore, unanimously voted, "based on medical evidence and in the interest of quality patient care," to suspend Willman's privileges. The Methodist Board of Trustees unanimously voted by secret ballot to affirm the committee's suspension of Willman's privileges. Pursuant to the board's instructions, the Medical Executive Committee re-reviewed with Willman the cases that the Quality Assurance Committee had forwarded to it. After this hearing, at which Willman was permitted to present evidence and call witnesses, the Medical Executive Committee determined that in eight of the seventeen reviewed cases Willman had provided substandard care. The committee therefore recommended, and the board agreed, that Willman's privileges should remain suspended.

In late 1983, Willman applied to have his medical staff privileges reinstated. Various committees of the medical staff considered the application and recommended denial because Willman had not submitted any evidence indicating that the deficiencies that led to the suspension of his privileges had been corrected. Article II, section three of Methodist's medical staff bylaws in effect in 1983 provided that "[t]he applicant shall provide adequate information for a proper evaluation of his application. If there is any doubt as to the competence, morals or ethics of the applicant, the burden shall be on him to resolve same." Willman requested and received a hearing before the Medical Executive Committee as well as before the Board of Trustees, following which both bodies voted to deny Willman's application for reinstatement. After a similar review process, Willman's June 1985 application for appointment to the medical staff of Methodist Medical Center (by then known as Heartland Hospital West) was also denied.

Because of Willman's treatment of Fanning, St. Joseph Hospital also reviewed Willman's staff privileges. In August 1982,

the Executive Committee of the St. Joseph Board of Directors directed the medical staff to consider the chest trauma consultation requirement that had been placed on Willman at Methodist to determine if a similar requirement would be prudent at St. Joseph. After a series of committee meetings and hearings, the Executive Committee of the medical staff recommended that Willman be required "to obtain immediate consultation from a board-certified general surgeon and/or thoracic surgeon on all cases of chest trauma requiring hospitalization." The Board of Directors voted to adopt this recommendation.

In September 1982, the Chairman of the St. Joseph Board of Directors directed the medical staff to review Willman's cases to determine the appropriateness of his staff privileges. Dr. Weinand, the Chief of Staff and Chairman of the Medical Executive Committee, appointed a special subcommittee to review Willman's 1981 and 1982 cases. The subcommittee forwarded seventeen of the 1981 and 1982 cases to the Medical Executive Committee, which held hearings on May 31 and June 7, 1983. During the hearings, Willman indicated that he would not be willing to take steps to improve his surgical and medical knowledge. The committee then voted to revoke Willman's privileges at St. Joseph Hospital.

Willman then requested an ad hoc hearing. The ad hoc committee members voted to uphold the Medical Executive Committee's decision. Willman appealed to the Board of Directors, and the board appointed an Appellate Review Committee to review the decision. The committee, which consisted of one physician and two laypersons, found that the previous committees had been fair and impartial and that it would be in the best interests of patient care to affirm their decisions. The Board of Directors then voted unanimously by secret ballot to revoke Willman's medical staff privileges at St. Joseph Hospital.

In December 1983, the Circuit Court of Buchanan County, Missouri, ordered that Willman's privileges at St. Joseph Hospi-

tal be reinstated. Fourteen months later, however, the Missouri Court of Appeals reversed the Circuit Court's order, and Willman's privileges at St. Joseph were once again revoked. *State ex rel. Willman v. St. Joseph Hosp.*, 684 S.W.2d 408 (Mo.Ct.App. 1984). In June 1985, Willman applied for staff privileges at St. Joseph Hospital (by then known as Heartland Hospital East). Various committees reviewed the application and held hearings, but, as with his applications submitted at Methodist Medical Center, Willman failed to provide evidence of his current qualifications. On November 27, 1985, the Board of Directors upheld the recommendations of the reviewing committees and unanimously voted to deny Willman's application.

Willman then filed this action, which alleged that the defendants had violated sections one and two of the Sherman Act and had interfered without justification in his existing and prospective economic relationships with his patients in violation of state law. The defendant hospitals filed a counterclaim for abuse of process. The district court granted the defendants' motion for summary judgment on the Sherman Act claims and, declining to exercise pendent jurisdiction, dismissed without prejudice Willman's state-law claim and the counterclaim. *Willman v. Heartland Hosp. East*, 836 F.Supp. 1522 (W.D.Mo. 1993).

II.

We review a grant of summary judgment de novo. *Grand Island Express v. Timpte Indus., Inc.*, 28 F.3d 73, 74 (8th Cir. 1994). We must decide whether the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

A. Section One Allegations

To prove a violation of section one of the Sherman Act, 15 U.S.C. §1, a plaintiff must show an agreement in the form of a

contract, combination, or conspiracy that imposes an unreasonable restraint on trade.

Unilateral actions of a single entity do not give rise to antitrust liability under section one of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 104 S.Ct. 2731, 2740-41, 81 L.Ed.2d 628 (1984). Section one of the Act applies only to concerted action. *Fisher v. City of Berkeley*, 475 U.S. 260, 266, 106 S.Ct. 1045, 1049, 89 L.Ed.2d 206 (1986); *Monsanto* Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984). Proof of concerted action requires evidence of a relationship between two or more legally distinct persons or entities. *Copperweld Corp.*, 467 U.S. at 769, 104 S.Ct. at 2740-41. The defendants argue that for purposes of section one a hospital and its medical staff are not separate entities when a medical staff recommends denial or revocation of a physician's staff privileges.

We have not decided whether a hospital has the capacity to conspire with its medical staff. *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682, 685 n. 3 (8th Cir. 1993). There is a split among the circuits that have considered the issue. Some courts hold that a hospital and its medical staff are not separate entities for purposes of section one because the medical staff acts as an agent of the hospital during the peer review process. *See, e.g., Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 703 (4th Cir. 1991) (en banc), *cert denied*, _____ U.S. _____, 112 S.Ct. 973, 117 L.Ed.2d 137 (1992); *Weiss v. York Hosp.*, 745 F.2d 786, 817 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). The Eleventh Circuit, on the other hand, has held that a hospital and the members of its medical staff are legally separate entities capable of conspiring with one another under the Sherman Act. *Bolt v. Halifax Hosp. Medical Ctr.*, 851 F.2d 1273, 1280 (11th Cir. 1988) (subsequent history omitted); *cf. Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988) (holding that a hospital has the capacity to

conspire with members of its medical staff, although not considering the issue in the context of peer review proceedings).

We need not decide whether a hospital can conspire with its medical staff, for even if we assume that the defendant hospitals had the capacity to conspire with their medical staffs, we conclude that Willman's section one claim fails. "Although revocation of a doctor's privileges may, perforce, eliminate competition by decreasing the number of doctors in a given specialty, this alone will not give rise to an antitrust violation." *Johnson v. Nyack Hosp.*, 964 F.2d 116, 121 (2d Cir. 1992). An essential element of a section one violation is proof of an unlawful objective. *Monsanto Co.*, 465 U.S. at 768, 104 S.Ct. at 1473 (requiring proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective"); *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946) (stating that "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement" is sufficient). Monitoring the competence of physicians through peer review is clearly in the public interest, *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992), and revocation of a physician's privileges because of legitimate concerns about the quality of patient care that he rendered is obviously a lawful objective. Willman contends, however, that the peer review proceedings were a "sham" and that his privileges were terminated to prevent him from competing with the defendants rather than because of concerns about substandard patient care.

We first consider Willman's argument that there is a genuine issue of fact concerning whether the peer review process was a sham. Specifically, Willman contends that the evidence "creates a genuine issue as to whether the peer reviewers reached the wrong result, and, as a consequence, removed a qualified physician." Based upon the record, we agree with Willman that whether he is a competent physician is in dispute. We do not

agree, however, that this factual issue precludes summary judgment. An antitrust action is not the proper forum in which to evaluate a physician's competence. *Oksanen*, 945 F.2d at 711 ("[t]he antitrust laws were not intended to inhibit hospitals from promoting quality patient care through peer review nor were the laws intended as a vehicle for converting business tort claims into antitrust causes of action."),[3] Accordingly, whether Willman actually provided substandard care is not the proper question. Rather, we must decide whether Willman's peer reviewers could have reasonably concluded that he provided substandard care.

Although the record contains evidence from physicians to the effect that in their opinion Willman had provided acceptable care, we nevertheless conclude that it would not have been unreasonable for Willman's peer reviewers to have doubts about the quality of Willman's patient care. Physicians who were not affiliated with the hospital defendants and who did not practice in St. Joseph and therefore did not compete with Willman agreed that in some cases Willman had rendered care that was below the acceptable standard. For example, Dr. Ben McCallister, a board-certified internist and cardiologist, reviewed the charts of nine of Willman's patients and found that three of these patients had received substandard care. Dr. Paul Koontz, a board-certified general surgeon, reviewed eight of Willman's charts and found that Willman's care was deficient in four cases. Dr. Alfred Gervin, who is board certified in general surgery, critical care medicine, and emergency room medicine, concluded that in twenty-three of the thirty-four charts that he had reviewed,

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[3] Recognizing that the possibility of antitrust liability may impede effective peer review, Congress enacted the Health Care Quality Improvement Act of 1986. 42 U.S.C. §§11101-11152. The Act immunizes medical peer review from antitrust liability if the challenged action is taken "in the reasonable belief that [it] was in the furtherance of quality health care." *Id.* §11112(a). We need not consider the impact of the Act on Willman's claims, for the Act was enacted after the events at issue in this case and is not retroactive.

Willman had either violated the acceptable standard of care or had rendered "terrible care." Dr. Kenneth Mattox, a board-certified general surgeon and thoracic surgeon, reviewed only the Fanning case and concluded that Willman's "lack of understanding of the potential ramifications to the patient, coupled with his actual mismanagement and mistreatment of the patient, demonstrate a careless and reckless disregard for the patient." Indeed, one of Willman's medical experts concluded that "some of the cases, you know, represent outer edges of what we perceive as standard of care."

Corrective action against a physician does not violate the antitrust laws if the physician's peer reviewers had legitimate medical reasons to believe that the physician provided substandard care. *Johnson*, 964 F.2d at 121. On the other hand, a factfinder may infer the existence of an illegitimate motive if the peer group's conclusions are so baseless that no reasonable medical practitioner could have reached those conclusions after reviewing the same set of facts. *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 821 (11th Cir. 1990). "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Conduct that is as consistent with a lawful motive as with an unlawful motive, standing alone, does not support the inference of an antitrust conspiracy. *Id.; see also Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993). Although Willman submitted affidavits to the contrary, we conclude that the opinions of Drs. McCallister, Koontz, Gervin, and Mattox established that the peer group's conclusions were not so baseless as to permit the inference of improper motive. Accordingly, we conclude that the limitation and eventual termination of Willman's staff privileges, in light of the conflicting medical opinions regarding the acceptability of Willman's care, is as consistent with the lawful motive of promoting quality patient care as with

an anticompetitive motive and therefore, without more, does not give rise to an inference of an antitrust conspiracy.

Willman contends, however, that the record contains additional evidence of an unlawful motive. He first argues that the participation of his competitors in the peer review process is evidence of such a motive. Although physicians whom Willman alleges were his competitors participated at every stage of the review process,[4] there is no evidence that the competitors acted in concert to pursue an unlawful motive. The record does indicate that Beheler, one of Willman's competitors, may have been biased against Willman. This evidence does not establish an anticompetitive motive among all of Willman's peer reviewers, however. Willman presented no evidence that any other competitors shared Beheler's sentiments, and Beheler submitted an affidavit stating that he never voted or participated in any deliberations concerning Willman's privileges to practice medicine at either Methodist or St. Joseph or their successors. Furthermore, Willman presented no evidence that Beheler or any other competitors attempted to unduly influence noncompetitor peer reviewers.

That the hospital boards and not the physicians whom Willman alleges were his competitors had authority to make the final decision concerning Willman's staff privileges further undermines Willman's theory of antitrust liability. Missouri law required that the hospital boards make the final decision. Mo.Code Regs. tit. 13, §50-20.021(2)(A)15. Each surviving board member who participated in the decisions regarding Willman's staff

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[4] Approximately sixty-five physicians participated in the review and evaluation of Willman. Willman claims that forty-three of the reviewers were his competitors because they practiced in one or more of the areas in which Willman practiced: general surgery, urology, gynecology, gastroenterology, and internal medicine. We express no opinion on whether Willman has properly defined his competitors.

privileges submitted an affidavit confirming that the boards had made the final decisions concerning Willman's staff privileges and that no physicians had attempted to pressure, coerce, or lobby the board members to terminate Willman's privileges. The affidavits further stated that no physicians had threatened to boycott or retaliate against the hospitals if the boards did not accept the medical staffs' recommendation to terminate Willman's privileges. Willman submitted no evidence to dispute the affidavits.

In addition to arguing that the medical staffs conspired with the defendant hospitals, Willman contends that the members of the medical staffs conspired among themselves to eliminate him as a competitor. Regardless of whether a hospital has the capacity to conspire with members of its medical staff, the staff physicians can conspire among themselves, giving rise to section one liability. *See, e.g., Oksanen*, 945 F.2d at 706; *Bolt*, 891 F.2d at 819; *Weiss*, 745 F.2d at 814. That the members of the medical staff can conspire among themselves, standing alone, however, does not permit a reasonable jury to conclude that the physicians acted in concert in pursuit of an unlawful objective. As we have previously discussed, the physicians' actions during the peer review process are as consistent with the lawful purpose of promoting quality patient care as with the unlawful purpose of eliminating potential competitors. Willman's bare, unsupported allegations that his competitors acted in concert to insulate themselves from competition are not adequate responses to the defendants' summary judgment motion and supporting evidence. *See Everett v. St. Ansgar Hosp.*, 974 F.2d 77, 80 (8th Cir. 1992) (holding that summary judgment is proper when physician merely alleges that his peer reviewers acted in bad faith and malice). Accordingly, we conclude that the grant of summary judgment on Willman's section one claims was proper. *See Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 617 (6th Cir. 1990), *cert. denied*, _____ U.S. _____, 112 S.Ct. 406, 116 L.Ed.2d 355 (1991).

B. Section Two Allegations

In addition to his section one claim, Willman raised two claims alleging a violation of section two of the Sherman Act, 15 U.S.C. §2. Willman alleges that in terminating his staff privileges, the defendants denied him access to the hospitals' facilities, which are essential for him to compete. The essential facilities doctrine requires those in possession of facilities which cannot practically be duplicated to share those facilities with their competitors. *City of Malden, Mo. v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989). To prevail under the essential facilities doctrine, the plaintiff must establish "(1) control of an essential facility by a monopolist; (2) the inability to practically or economically duplicate the facility; and (3) the unreasonable denial of the use of the facility to a competitor when such use is economically and technically feasible." *Id.*

The defendants argue that the essential facilities doctrine does not apply to a hospital's facilities in a staff privilege revocation case. We need not decide this question, however, for, as we have discussed above, the defendants' concerns about the care provided by Willman were legitimate. Terminating the staff privileges of a physician who may be rendering substandard care does not constitute an unreasonable denial of the use of the hospitals' facilities.

Willman also asserts a section two claim for monopoly leveraging. The elements of a monopoly-leveraging claim are (1) monopoly power in one market, (2) the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another distinct market, and (3) injury caused by the challenged conduct. *Carleton v. Vermont Dairy Herd Improvement Ass'n*, 782 F.Supp. 926 (D.Vt. 1991). The defendants contend that the doctrine is not applicable in the present case and, alternatively, that monopoly leveraging is not an independent basis for liability under section two of the Sherman Act. Assuming that monopoly

leveraging is a cognizable section two claim, we agree that Willman has failed to show that the doctrine is applicable. As we have already discussed, Willman did not present sufficient evidence to support his allegations that the defendants acted with an anticompetitive motive. Accordingly, he cannot satisfy the second element.

C. Pendent Jurisdiction

Having disposed of all of the federal claims, the district court declined to exercise jurisdiction over the remaining state-law claim and the counterclaim. Willman argues that the district court should not have declined to exercise supplemental jurisdiction. The proper question, however, is whether the district court should have exercised pendent jurisdiction over the state-law claim and the counterclaim. The Judicial Improvements Act of 1990 codified the former common law doctrines of pendent and ancillary jurisdiction under the new rubric of supplemental jurisdiction. *See* 28 U.S.C. §1367. *See also McLaurin v. Prater*, 30 F.3d 982, 984-985 (8th Cir. 1994). The Act applies to actions commenced on or after December 1, 1990. This action was commenced in 1989, so we review the district court's ruling on this issue under pre-Act case law.

"The decision to exercise pendent jurisdiction over state law claims is a matter of discretion for the district court." *Hassett v. Lemay Bank & Trust Co.*, 851 F.2d 1127, 1130 (8th Cir. 1988). In *United Mine Workers v. Gibbs*, the Supreme Court recognized that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Willman nevertheless contends that because the parties had completed a lengthy and complex discovery process and because the district court granted the defendants' motion for summary judgment less than two weeks before trial, the district court should have exercised jurisdiction over the state-law claims. Recognizing the district court's broad discre-

tion in deciding whether to exercise pendent jurisdiction, we have upheld the refusal to exercise jurisdiction over a state-law claim even though the federal claims were disposed of late in the proceedings and the court had already devoted significant judicial resources to the state claim. *Marshall v. Green Giant Co.*, 942 F.2d 539, 549 (8th Cir. 1991). So also in this case, we hold that the district court did not abuse its discretion by declining to exercise jurisdiction over the state-law claim and counterclaim in this case, a decision that we note would have fallen within one of the exceptions to the exercise of supplemental jurisdiction contained in the 1990 Act. *See* 28 U.S.C. §1367(c)(3); *McLaurin*, 30 F.3d at _____.

The judgment is affirmed.

WELLFORD, Senior Circuit Judge, concurring.

I join in Judge Wollman's comprehensive opinion, except that I would join the Fourth Circuit (en banc) and the Third Circuit in concluding that for Sherman Act purposes, absent special circumstances not present in this case, "the peer review process does not represent the sudden joining of independent economic forces that section one [of the Sherman Act] is designed to deter and to penalize." *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 703 (4th Cir. 1991) (en banc), *cert. denied*, _____ U.S. _____, 112 S.Ct. 973, 117 L.Ed.2d 137 (1992). *See also Weiss v. York Hospital*, 745 F.2d 786, 814 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). Accordingly, I would conclude that the medical staffs and review committees of the defendant hospitals, as a matter of law, cannot be held to conspire with the hospitals in conducting a good faith peer review of a staff member whose medical conduct is under investigation.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0785-CV-W-9

CHARLES R. WILLMAN, M.D.,
Plaintiff,

v.

HEARTLAND HOSPITAL EAST, et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON COUNTS I, II AND III, DISMISSING COUNT IV WITHOUT PREJUDICE AND DISMISSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM

Alleging a *per se* violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (Count I), restraint of trade in violation of the Sherman Antitrust Act, 15 U.S.C. §1 (Count II), monopoly leveraging and abuse of an essential facility in violation of the Sherman Antitrust Act, 15 U.S.C. §2 (Count III) and intentional interference with business expectancy (Count IV), plaintiff Charles R. Willman seeks reinstatement of his admission privileges at defendant hospitals, costs of litigation, attorney fees and damages. Defendants Heartland Health Systems, Heartland Hospital East and Heartland Hospital West (hereafter "the defendant hospitals") and Richard Craig, Ernest Weinand, Edward Beheler, Edward Andres, Steven Krueger, James McMillen, Robert Stuber, Orlyn Lockard, Charles Mullican and Wallace McDonald (hereafter "defendant doctors") move for summary judgment on Counts I, II, III and IV of the Complaint.

In addition to denying the claims asserted by plaintiff, defendants have asserted a Counterclaim against plaintiff for abuse of process and malicious prosecution. Plaintiff moves for summary judgment against defendants on the Counterclaim.

I. *Facts*

Plaintiff Dr. Charles Willman began practicing medicine in St. Joseph in 1959. Plaintiff practiced general surgery and provided general medical services in Buchanan County, Missouri, and surrounding areas. Willman had endoscopy facilities in his office and planned to construct a one-day surgical center. Defendant hospitals also had endoscopy facilities.

Defendant Heartland Hospital East is a Missouri Corporation. Prior to June 26, 1985, it operated under the name St.Joseph Hospital. Defendant Heartland Hospital West is also a Missouri corporation. Prior to June 26, 1985, it operated under the name Methodist Medical Center. In 1983 the Hospitals created a corporation, Heartland Health Affiliates, to coordinate the operation and services of the hospitals. Defendant Heartland Health System, Inc. is the successor to Heartland Health Affiliates.

Defendant Richard Craig, M.D. practices general surgery. Craig was Chief of the Department of Surgery at Methodist Hospital and was a member of the Executive Committee.

Defendant Ernest Weinand, M.D. practices general surgery. Weinand was a member of Methodist's credentials Committee and of St. Joseph's Executive Committee.

Defendant Edward Beheler, M.D. practices general surgery. Beheler was a member of Methodist's Critical Care Committee, Methodist's Board of Trustees and of St. Joseph's Executive, Credentials and Critical Care Committees.

Defendant Edward Andres, M.D. practices General Surgery. He was a member of St. Joseph's Critical Care, Ad Hoc and Credentials Committees.

Defendant Steven Krueger, M.D. practices primary care/ internal medicine. He was a member of Methodist's Credentials and Critical Care Committees and of St. Joseph's Executive, Credentials and Critical Care Committees.

Defendant James McMillen, M.D. practices primary care/ internal medicine. He was a member of Methodist's Executive and Credentials Committees and was President of General Staff at Methodist. McMillen also participated in proceedings before the St. Joseph Hospital Board of Trustees.

Defendant Robert Stuber, M.D. practices internal medicine/ primary care. He was a member of Methodist's Critical Care and Executive Committees and the Board of Directors of St. Joseph Hospital.

Defendant Orlyn Lockard, M.D. practices endoscopy. He was a member of Methodist's and St. Joseph's Executive Committee. He was also President of the General Staff at St. Joseph's.

Defendant Charles Mullican, M.D. practices primary care/ internal medicine. He was a member of Methodist's Executive and Critical Care Committees and of St. Joseph's Executive Committee.

Defendant Wallace McDonald, M.D. practices primary care/ internal medicine. He was a member of Methodist's Executive Committee.

In February 1982, the Critical Care Committee of Methodist Hospital reviewed Willman's care of patient Bobby Fanning. After this review, Willman's privileges were limited by adding a consultation requirement. Willman's privileges were suspended at Methodist Hospital in February 1983. A hearing was

held in June 1983, that resulted in a recommendation to the Board of Trustees at Methodist to revoke Willman's privileges. The Board suspended his privileges in July 1983. The Board denied Willman's reapplication for privileges in 1984 and a new application for privileges in 1986.

St. Joseph Hospital reviewed the Fanning case in 1983. In May 1983, the Credentials Committee recommended revocation of Willman's privileges and the recommendation was approved by the executive committee in June 1983. The Board of Trustees voted to revoke Willman's privileges. At Willman's request, the Circuit Court of Buchanan County in 1983 issued a writ of mandamus requiring St. Joseph Hospital to restore his privileges. Willman practiced general surgery at St. Joseph Hospital for slightly less than 15 months, until the writ was dissolved in 1985. St. Joseph Hospital denied Willman's 1985 application for privileges for the year 1986.

In 1983 or 1984, Willman applied for privileges at Atchison Hospital, but was told that he should consider withdrawing his application because of the suspension of privileges at Methodist and St. Joseph Hospitals.

Willman applied for privileges at Spelman Memorial Hospital in 1985 and his application was rejected after Spelman received a copy of the Ad Hoc committee report dated October 19, 1983, from St. Joseph Hospital.

Willman's malpractice insurance with Momedico was cancelled in July 1982. Willman was insured by St. Paul Fire & Marine from 1982 to August 17, 1985. St. Paul cancelled Willman's insurance because his privileges had been suspended at Methodist and St. Joseph Hospitals.

II. *Standard for Summary Judgment*

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, deposi-

tions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970); *Inland Oil and Transport Co. v. United States*, 600 F.2d 725, 727-28 (8th Cir.), *cert. denied*, 444 U.S. 991, (1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2555 (1986); *see also City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 106 S. Ct. at 2553.

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the *absence* of genuine issues of material fact. However, the moving party *is not required* to support its motion with affidavits or other similar materials *negating* the opponent's claim. *Id.* (emphasis added).

The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogato-

ries and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.* at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 106 S. Ct. 1348, 1356 (1986) (footnote omitted).

The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a verdict for that party. *Anderson v. Liberty Lobby*, 106 S. Ct. at 2511.

In applying these rules to a case brought under 15 U.S.C. §1, the Sherman Antitrust Act, the Eighth Circuit Court of Appeals cautions that "[b]ecause a fine line separates unlawful concerted action from legitimate business practices, an antitrust conspiracy cannot be inferred from 'highly ambiguous evidence.'" *Lovett v. General Motors Corp.*, 998 F.2d 575, 577, (quoting *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984). "Conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Essentially, the question in ruling on a motion for summary judgment and on a motion for directed verdict is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 2512.

III. *Discussion*

A. *Counts I and II*

In Counts I and II of the Complaint, plaintiff alleges violations of 15 U.S.C. §1, the Sherman Antitrust Act. The essential elements of a claim under §1 of the Sherman Act are:

1) a contract, combination or conspiracy;

2) affecting interstate commerce;

3) which imposes an unreasonable restraint of trade.

White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495 (6th Cir. 1983) (citations omitted).

In Count I of the Complaint, plaintiff alleges a *per se* violation of the Sherman Act, 15 U.S.C. §1. "No court has applied a *per se* rule when an individual has been denied privileges." Julian O. von Kalinowski, 6 *Antitrust Laws and Trade Regulations* §52.03[1] (1992). In *Flegel v. Christian Hospital Northeast-Northwest*, ____ F.3d _____, 1993 WL 345593 (8th Cir. 1993), the plaintiff, an osteopath, alleged that a hospital and doctors from the medical staff conspired with one another to boycott the plaintiff from obtaining privileges in violation of Section 1 of the Sherman Act. The Eighth Circuit Court of Appeals held that a *per se* analysis was not applicable to a medical staff privilege case because "[t]he exclusion from staff privilege in this case arguably falls within the category ... 'industry self regulation' and is consequently not appropriate for per se analysis." *Id.* at * 5 (citing *Weiss v. New York Hospital*, 745 F.2d 786 (3d Cir. 1984).

Similarly, in this case industry self-regulation is involved because Willman was excluded from staff privileges as the result of peer review. Therefore, plaintiff's *per se* theory must fail. Summary judgment will be granted to all defendants on Count I, the claim for a *per se* violation of the Sherman Antitrust Act.

Even if a *per se* claim were available in a case involving exclusion from the medical staff of a hospital, summary judgment on Counts I and II would be granted because Willman has failed to present facts from which a reasonable jury could conclude that a contract, combination or conspiracy existed. Therefore, plaintiff has not demonstrated that he can satisfy the first element of a §1 claim.

Willman alleges that some of the doctors on the medical staff both conspired among themselves and with the defendant hospitals to revoke his hospital privileges and to deny his reapplication for privileges in violation of 15 U.S.C. §1. In order to satisfy the first element of a §1 claim, there must be a conspiracy "between *separate* entities. It [the Sherman Act] does not reach conduct that is 'wholly unilateral.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (emphasis in original). "Independent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984).

The Eighth Circuit Court of Appeals has not yet determined whether a hospital can conspire with its medical staff. *Flegel v. Christian Hospital Northeast-Northwest*, _____ F.3d _____, 1993 WL 345593 n.3 (8th Cir. 1993). There is a split among the Circuits on whether a hospital is capable of conspiring with its medical staff to violate antitrust laws. *See* cases cited in *Flegel*, ____ F.3d at ____, 1993 WL 345593 n.3. I believe that the better-reasoned decisions recognize that the intercorporate immunity doctrine applies to peer review proceedings.

For instance, in *Okansen v. Page Memorial Hospital*, 945 F.2d 696, 703 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992), the plaintiff contended that during the peer review process the medical staff conspired with the hospital and members of the medical staff conspired among themselves to revoke his hospital privileges. Based on the principle of intercorporate immunity articulated in *Copperweld Corp. v. Independence Tube Corp.*,

467 U.S. 752 (1984), *Okansen*, held that the staff is incapable of conspiring with the hospital.

> In effect, the medical staff was working as the Board's agent under an 'internal agreement to implement a single unitary firm's policies' of evaluating the conduct and competence of those to whom the hospital extended privileges.
>
> This type of delegation of authority does not implicate the concerns of section one of the Sherman Act. The decision to conduct the peer review process does not represent the sudden joining of independent economic forces that section one is designed to deter and penalize. '[T]here are not strong anti-trust concerns that would warrant a departure from the traditional concepts of agency since the hospital and medical staff are not competitors.' Far from being a competitor with the hospital, the medical staff was in fact a natural component of the hospitals management structure.

Id. at 703 (quoting *Nurse Midwifery Assoc. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990).

Plaintiff responds relying on *Steele v. Armour & Co.*, 583 F.2d 393, 398 (8th Cir. 1978). Plaintiff argues that an agency relationship does not arise solely because the hospitals controlled the final decision.

"A principal/agent relationship is established by showing manifestation of consent by one person to another that the other shall act on his own behalf, and subject to his control, and consent by the others so to act." *Montague v. Heater*, 836 F.2d 422, 424 n.3 (8th Cir. 1988) (citing *Leidy v. Taliaferro*, 260 S.W.2d 504, 505 (Mo. 1953)). In other words, "[t]he principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control." Restatement of Agency 2d §1 cmt. a. (1958).

Here, the hospital boards delegated to the medical staff the responsibility for conducting the initial peer review pursuant to a procedure adopted by each Board. After the medical staff performed its part of peer review, the board of each hospital made the final decision with regard to staff privileges. In the peer review process, the staffs participating in the hospitals' peer review procedures were acting as agents of the hospitals. As stated in *Okansen*, "[t]his type of delegation of authority does not implicate the concerns of section one of the Sherman Act." *Okansen*, 945 F.2d at 703.

Plaintiff argues that, even if the medical staffs were agents of the hospitals, the "personal stake" exception to intercorporate immunity applies because the staff doctors conducting the peer review were competitors of the plaintiff. Of the approximately 65 doctors who participated in the peer review process at the hospitals, 43 practiced either general surgery, primary care/ internal medicine, gynecology/urology or endoscopy. One of Willman's expert witnesses has concluded that Willman competed with physicians who practice general surgery (Willman's specialty) as well as urology, gynecology, gastroenterology and internal medicine. Therefore, Willman asserts that the physicians who reviewed his performance were his competitors and that a reasonable inference arises that they acted against him with an anti-competitive motive.

The "personal stake" exception "arises when the officers or agents were, at the time of the conspiracy, acting beyond the scope of their authority or for their own benefit." *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*, 531 F.2d 910, 917 (8th Cir. 1976) (citing *Greenville Pub. Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974)).

In *Okansen*, this same argument was made and rejected. There, two competitors of Dr. Okansen were involved in the peer review, although one of the competitors was not accepting new patients:

> In any event, the more important aspect of *Greenville* for the purposes of peer review is the degree of control the officer or agent with the independent interest exercised over the defendant firm's decision making process. If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis. *See* P. Areeda, Antitrust Law, ¶1471d & g (1986). In *Greenville*, the individual who had an interest in another firm was also the defendant company's president, director, and shareholder. Consequently, he could control the defendant company's decisions.
>
> Here, by contrast, the medical staff had no such control. 'To give advice when asked by the decision maker is not equivalent to being the decision maker itself.' *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 259 (3d Cir. 1984). The Board of Trustees at Page Memorial requested and encouraged the medical staff to take corrective action against Okansen. The Board in the end retained authority over staff privilege decisions at Page Memorial. Because the challenged decision was subject to review by the hospital and because decision making authority in Dr. Okansen's case was dispersed among a number of individuals, the personal stake exception is inapplicable.

Okansen, 945 F.2d at 705.

In the present case, the final decision on questions of staff privileges rested with the Boards of the defendant hospitals. On July 22, 1983, the Board of Trustees of Methodist Medical Center met and voted unanimously by secret ballot to suspend Willman's privileges through December 31, 1983. Two of the thirteen Board members present at this meeting were physicians. Neither physician is a defendant in this case. On May 17, 1984, the Board of Trustees for Methodist met and considered the recommendation from the medical staff executive committee to

deny Willman's application for reappointment. Four of the 16 Board members present were physicians. One of the physicians is a defendant. Fourteen votes were cast to deny Willman's application with two abstentions. Beheler, the defendant who was present, abstained. On December18, 1985, the Board of Methodist voted unanimously to approve the decision of the executive committee of the medical staff which denied Willman's request for appointment to the staff. Five of the 14 Board members present were physicians. Only one physician Board member is a defendant in this case.

At St. Joseph, the executive committee of the Board of Directors on August 25, 1982, directed the medical staff to review the action taken at Methodist restricting Willman's privileges. No defendants were present. The Board met again on November 7, 1983, with 15 members present. Three of the Board members were physicians, but only one defendant was present. At this meeting, Willman's privileges at St. Joseph Hospital were revoked by a unanimous vote. At the November 27, 1985, Board meeting, the Board unanimously voted to deny Willman's application for appointment to the medical staff. Eleven Board members were present, three of whom were physicians. Only one physician defendant was present.

At each of the crucial Board meetings in both hospitals, physicians made up a small percent of the voting Board members and only some of these physicians are defendants. At no meeting did the doctor members of either Board provide the determining votes. Therefore, no reasonable jury could conclude that the defendant doctors actually controlled the Board's decision regarding Willman's staff privileges.

Although the hospitals here could not conspire with their staff doctors, members of the medical staff could conspire with each other and theoretically could coerce the Hospital Board to take action consistent with the objective of the conspiracy. "A medical staff can be comprised of physicians with independent

and at times competing economic interests. As a result, when these actors join together to take action among themselves, they are unlike a single entity and therefore they have the capacity to conspire as a matter of law." *Okansen*, 945 F.2d at 706.

In the present case, Willman has not shown that the defendant doctors, who allegedly competed with Willman, did anything other than meet with other doctors during the peer review process. Willman seems to believe that "the fact the medical staff met and took action against him through the peer review process proves the existence of a conspiracy." *Id.* But just as in *Okansen*, this is not enough. "[T]here must be something more such as a conscious commitment by the medical staff to coerce the hospital into accepting its recommendation." *Id.*

Here, each board member has presented an affidavit stating that he/she made the final decision and that he/she acted independently of the staff. "[D]enial of the conspiracy by defendant's affidavits is sufficient, under Rule 56(e), to shift the burden to plaintiff to establish a factual question by the offering of evidence of the conspiracy." *Pontius v. Children's Hospital*, 552 F. Supp. 1352, 1375 (W.D. Pa. 1982) (citing *Daley v. St. Agnes Hospital, Inc.*, 490 F. Supp. 1309 (E.D. Pa. 1980); *see also Lambs Patio Theatre, Inc. v. Unusual Film Exchanges, Inc.*, 582 F.2d 1068 (7th Cir. 1978)). Plaintiff provides a couple of affidavits that state that hospital Boards defer to staff recommendations about staff privileges. Even if the Boards of the two hospitals did defer to staff recommendations, there is no evidence they did so because they were coerced. As the affidavits of the non-physician Board members state, the Board members exercised their independent judgment.

Therefore, because this case is closer to *Okansen* than *Greenville*, the personal stake exception is inapplicable. The doctrine of intercorporate immunity prevents plaintiff from establishing that there was a conspiracy between separate entities; the hospitals and their medical staffs were a single entity.

If I assume that the doctors not only had the capacity to conspire with one another but that they did indeed conspire during the peer review process, this conspiracy would be meaningless in the context of the § 1 claims advanced by plaintiff "if the staff lacks the final authority to implement any agreement that it does reach." *Okansen*, 945 F.2d at 706. Because Willman has not presented facts from which a reasonable jury could conclude that the defendant doctors coerced the Boards of the hospitals to effectuate any agreement they had, his § 1 claim against defendant doctors must fail for lack of a causal connection between the assumed conspiracy and the action taken by the Board of each hospital on the several votes involving plaintiff's hospital privileges.

Even if a medical staff and a hospital can conspire to violate § 1 of the Sherman Act, Willman's claims as to Counts I and II would still fail because no reasonable juror could infer the existence of an antitrust conspiracy from the circumstantial evidence in this case. As stated by the Eighth Circuit Court of Appeals in *Lovett v. General Motors Corp.*, 998 F.2d 575, 578 (8th Cir. 1993), "[b]ecause a fine line separates unlawful concerted action from legitimate business practices, an antitrust conspiracy cannot be inferred from 'highly ambiguous evidence.'" (quoting *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984)). Although the court "view[s] the evidence and all reasonable inferences in the light most favorable" to the plaintiff, "the range of permissible inferences from ambiguous evidence is limited in a section one case." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)). "*Monsanto* does not permit a jury to infer the existence of a conspiracy from ambiguous evidence." *Id.* at 579. The court in *Lovett* also stated that "[c]onduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* "An inference of conspiracy must be 'reasonable in light of the competing inferences of independent action.'" *Id.* (quoting

Monsanto, 475 U.S. at 588). Although *Lovett* was a review of a judgment as a matter of law, the standard for judging evidence on a motion for summary judgment parallels that of a directed verdict, the precursor to judgment as a matter of law. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2511 (1986).

In the present case, Willman presents no direct evidence of a conspiracy. However, Willman argues that the existence of a conspiracy can be inferred from facts which he has presented. Therefore, I must "decide whether a reasonable juror could infer the existence of a conspiracy from the circumstantial evidence." *Lovett*, 998 F.2d at 578. The heart of Willman's conspiracy claim is his factual conclusion that competitors participated in the peer review process. Willman then concludes that the peer review process was a "sham" to cover up his competitors' intent to drive him out of the St. Joseph market.

Plaintiff cites *Gibson v. Berryhill*, 411 U.S. 564 (1973) for the proposition that competitors of a physician should not participate in peer review of that physician. *Gibson* involved licensing issues at the state level, not peer review. In *Gibson*, the Alabama Board of Optometry could only be composed of optometrists who were in private practice. Of the 192 optometrists in the state, 100 were in private practice and 92 were employed by others. There were no charges of substandard care in *Gibson*. "[T]he aim of the board was to revoke the licenses of all optometrists in the state that were employed by business corporations . . . and that these optometrists accounted for nearly half of all optometrists practicing in Alabama." *Id.* at 578. Driving half of the optometrists in the state out of business would have a direct, measurable effect on the business of the remaining private optometrists.

Here, Willman lists 43 physicians who he contends were competitors. One doctor's patients divided among 43 physicians does not suggest the level of pecuniary interest that made the state licensure proceeding in *Gibson* a violation of due process.

The insignificant competitive advantage to be gained by the alleged co-conspirators destroys the reasonableness of the inference Willman seeks to draw from the participation of his competitors.

In addition, Willman supports his argument that the peer review process was a sham by presenting expert testimony that the care he provided was proper. However, Willman's own medical experts, even if believed fully, do not establish that the peer reviewers were so misguided that one could conclude reasonably that the process was a sham. For instance, Dr. Miller, one of Willman's medical experts, testified that "some of the cases, you know, represent outer edges of what we perceive as standard of care." Miller depo. p 171, l. 19-22. Also, Willman's own experts do not state that the peer review committees were unreasonable to be concerned about the issues they inquired about. If believed, Willman's experts establish that reasonable medical minds may differ about how seriously Willman's treatment departed from acceptable practice. This would not allow a reasonable jury to conclude that the process was a sham.

Because the purpose of peer review is to maintain quality patient care and because hospitals have an "unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges," (*Jefferson Parish Hosp. Dist. No. 12 v. Hyde*, 466 U.S. 2, 30 (1984)), a peer review process that is at least as consistent with this lawful purpose as with an illegal conspiracy to restrain trade cannot support an inference of antitrust conspiracy and does not justify subjecting these health care provider defendants to the expense of a lengthy jury trial.

Bolt v. Halifax Hospital Medical Center, 891 F.2d 810, 821 (11th Cir. 1990), *cert. denied*, 495 U.S. 924 (1990), relied on by plaintiff, demonstrates the deficiency in the factual record presented by plaintiff. In *Bolt*, the court concluded that a conspiracy could easily be inferred from expert testimony that no reasonable

medical practitioner could have reached the same conclusion about a physician that was reached by the peer reviewers in that case. But none of Willman's experts state that a reasonable medical practitioner could not have concluded that Willman's work was substandard. The mere fact that Willman's experts may reach a different conclusion about the quality of care furnished by Willman is not sufficient to create an inference that the doctors and hospitals conspired in violation of antitrust law when they reached a different but nevertheless reasonable conclusion about the quality of care Willman's patients received.

Plaintiff points to the refusal by defendant doctors to consider Willman's performance during the 15 months in which Willman practiced at the hospitals pursuant to a court order from Buchanan County, Missouri, as evidence of improper motive. There was friction between the plaintiff and defendants. The defendants believed that they were maintaining practice standards that would benefit the hospitals' reputation and protect the public. Plaintiff believed that he was being treated unfairly. As a result, Willman secretly tape-recorded numerous conversations with physicians in St. Joseph. Also, he obtained a court order requiring St. Joseph Hospital to allow him to practice in that hospital. Under these circumstances, not considering plaintiff's performance in the hospital while under the court order was just as likely to be because of the friction between Willman and the members of the medical staff as because of any antitrust conspiracy.

Certainly Willman has had a full opportunity to develop the evidence in this case. Over 100 days of depositions have been taken. The inferences Willman relies on to support his conspiracy theory conflict with economic reality because the hospitals had every incentive to include as many physicians as possible on their staffs. The more staff physicians a hospital has admitting and treating patients, the more revenue for the hospital.

Therefore, because the hospital and its medical staff do not have the capacity to conspire and because, even if they did have this capacity, the plaintiff's evidence of conspiracy is not sufficient to create a genuine issue for trial, summary judgment will be granted on Counts I and II of the Complaint.

B. *Count III*

In Count III, plaintiff alleges a violation of 15 U.S. C. § 2. According to the plaintiff "[c]ount III of Dr. Willman's complaint states a cause of action pursuant to Section 2 of the Sherman Act (15 U.S.C. §2) for two closely related theories: abuse of an essential facility and monopoly leveraging." Pl. Brief at 22.

Section 2 of the Sherman Act "prohibits monopolization and attempted monopolization of trade or commerce. The offense of monopoly under section 2 has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen, or historic accident." *City of Malden, Mo. v. Union Elec. Co.*, 887 F.2d 157, 160 n.3 (8th Cir. 1989) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In order to "demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993).

"Under the 'bottleneck' or essential facilities doctrine, those in possession of facilities which cannot practically be duplicated must share the facilities with their competitors on fair terms." *City of Malden*, 887 F.2d at 160. (citations omitted). The elements of the essential facilities doctrine are: 1) control of an essential facility by a monopolist; 2) the inability to practically or economically duplicate the facility; and 3) the unreasonable

denial of the use of the facility to a competitor when such use is economically and technically feasible. *Id.*

With regard to the third element, "the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (footnote omitted). Applying this principle to a hospital's efforts to monitor the performance of staff doctors, several courts have found that the essential facilities doctrine is not applicable when a hospital facility is denied to a physician. In *Pontius v. Children's Hospital*, 552 F. Supp. 1352, 1371 (W.D. Pa. 1982), the court stated:

> We believe it would be singularly inappropriate to apply a doctrine which would prevent a hospital from keeping doctors it had adjudged unqualified off of its staff. Neither public policy nor the Sherman Act can continence such a result. Consequently we now hold that the essential facilities doctrine is inapplicable to hospital staff privileges decisions.

In *Robles v. Humana Hospital Cartersville*, 785 F. Supp. 989, 996 (N.D. Ga. 1992), the court, after quoting this language from *Pontius*, concluded "this Court concludes that the essential facilities doctrine is not applicable to cases involving hospital peer review decisions which revoke or limit a doctor's medical staff privileges."

In *Castelli v. Meadville Medical Center*, 702 F. Supp. 1201, 1209 (W.D. Pa. 1988) the court granted summary judgment in a case involving an exclusive contract with a hospital because the court was "persuaded that the essential facilities doctrine is not appropriate for a hospital's decisions about professional services."

I agree with this conclusion. Hospital decisions to revoke or limit staff privileges are essentially pro-competitive. "[T]he peer review process, by policing the competence and conduct of doctors, can enhance competition." *Okansen*, 945 F.2d at 709. By monitoring the quality of care received by patients at the hospital, the hospital improves its competitive position in the eyes of the health care consumer.

Even if the essential facilities doctrine were applicable, plaintiff's claim would still fail because the hospitals' concerns about the care provided by Willman were not unreasonable. As previously discussed, even Willman's experts concede that the questions asked by the defendants during peer review were not unreasonable. Also, a Missouri state court has stated that one committee's decision to recommend revocation of Willman's privileges at St. Joseph's Hospital was reasonable. *Willman v. Dooner*, 770 S.W.2d 275 (Mo. Ct. App. 1989). "This Committee was not on a witch hunt. They picked Willman for good reasons." *Id.* at 278. In light of these considerations, the essential facilities doctrine is not available in this hospital staff privileges case.

Furthermore, even if I were to hold that the doctrine is applicable to staff privileges cases, the plaintiff's claim would still fail because he fails to show that the control of the hospital facility carries with it the power to eliminate competition in the downstream market.

In *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992), the court held that the essential facility doctrine only applies to a monopolist if the monopolist's control over the facility carries with it the power to eliminate competition in the downstream market.

As stated in defendants' brief, the hospitals could not eliminate competition for general surgical services or any other medical services in St. Joseph:

> *Alaska* applies with equal force here. In this case, the "monopolist," Heartland, is incapable of ever eliminating competition in the market of general surgical services in St. Joseph, MO. plaintiff has not claimed, and could not claim, that surgery on persons in St. Joseph would cease to be performed if defendant refused to allow anyone to use its surgical facilities. Even if Heartland closed its doors to *all* surgeons (a *reductio ad absudum*, to be sure), Heartland could not prevent physicians from performing surgery for people in St. Joseph, although the site of that surgery might move from St. Joseph to some other location such as Liberty, North Kansas City, Kansas City, Cameron or Chillicothe. Thus, it is impossible for Heartland to ever monopolize the 'downstream' market of general surgery, and the essential facilities doctrine is not applicable to this Section 2 claim.

Def. Brief at 6.

Additionally, although the essential facilities doctrine has its own elements, it is still a claim under §2 of the Sherman Act for either illegal monopoly or attempted monopoly. The second element of a monopoly claim is "the willful acquisition or maintenance of" monopoly power. *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966). The Fourth Circuit Court of Appeals stated that in order to satisfy this element the plaintiff must show that a jury could find no valid business reason or concern for efficiency in the choice the defendant made. *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 105 (4th Cir. 1987) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)). Specific intent is also required in an attempted monopoly. *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993).

Although the plaintiff has presented expert testimony that the expert would not have revoked Willman's hospital privileges, these experts do not state that it was unreasonable for either

hospital to revoke his privileges. Willman has been unable to present any evidence that the hospitals did not have valid business reasons for seeking to revoke the hospital privileges of a doctor who was believed reasonably to have rendered substandard care. Therefore, summary judgment will be granted as to the essential facilities claim of Count III.

Plaintiff also asserts a claim under §2 of the Sherman Act for monopoly leveraging. Plaintiff relies on *Berkley Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), and *Carleton v. Vermont Dairy Herd Improvement Association Inc.*, 782 F. Supp. 926 (D. Vt. 1991) for the proposition that monopoly leveraging is a separate claim under §2. However, the Second Circuit Court of Appeals, after the *Berkley Photo* decision, stated that the recognition of a claim for monopoly leveraging was dictum. Also, *Berkley Photo* was a case involving a tying claim, not a case involving the denial of essential facilities. *Twin Laboratories v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990). No tying claim has been alleged in this case.

In addition, the Ninth Circuit Court of Appeals has held that "monopoly leveraging" is not an independent theory for recovery under §2 of the Sherman Act, it is just a claim for an attempted monopolization of a second market. *Alaska Airlines*, 948 F.2d at 547.

Therefore, because monopoly leveraging is just another way of alleging either monopolization or attempted monopolization, and because I have already determined that defendants are entitled to summary judgment on a claim of monopolization or attempted monopolization, summary judgment will be granted on all claims in Count III.

C. *Count IV and the Counterclaim*

Having granted summary judgement on Counts I, II and III, I decline to exercise supplemental jurisdiction as to the state law claims asserted in Count IV and the Counterclaim.

IV. *Conclusion*

Plaintiff is no stranger to litigation over the peer review proceedings that led to the revocation of his privileges at the hospitals. *See Willman v. Dooner*, 770 S.W.2d 275 (Mo. Ct. App. 1989); *State ex rel. St. Joseph Hospital v. Fenner*, 726 S.W.2d 393 (Mo. Ct. App. 1987); *State ex rel. Willman v. St. Joseph Hospital*, 707 S.W.2d 828 (Mo. Ct. App. 1986); and *State ex rel. Willman v. St. Joseph Hospital*, 684 S.W.2d 408 (Mo. Ct. App. 1984). The antitrust laws were not intended to be used to subject health care providers to protracted and expensive litigation over efforts to protect the public from substandard care when the evidence of defendants' acts is just as consistent with permissible self-regulation in the public interest as with an illegal conspiracy. *See Lovett v. General Motors Corp.*, 998 F.2d at 577.

Accordingly, for the reasons stated, it is ORDERED that:

1) defendants are granted summary judgment as to Counts I and II of plaintiff's Complaint;

2) defendants are granted summary judgment as to Count III of plaintiff's Complaint; and

3) Count IV and the Counterclaim are dismissed without prejudice.

/s/ D. Brook Bartlett
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri
October 19, 1993.

APPENDIX C

Section 1 of the Sherman Act, 15 U.S.C. §1, provides, in relevant part, that,

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. §2 provides, in relevant part, that,

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides, in relevant part, that,

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(2)

No. 94-1280

FILED
FEB 24 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CHARLES R. WILLMAN, M.D.,

Petitioner,

v.

HEARTLAND HOSPITAL EAST, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondents respectfully suggest that the issues framed by petitioner are more accurately stated as follows in a single issue:

> Whether an antitrust conspiracy could be reasonably inferred solely from the discipline petitioner received as a result of medical peer review proceedings, when independent evidence, including testimony from petitioner's own experts, shows that the peer review committees had before them evidence that petitioner repeatedly provided substandard care to his patients.

RULE 29.1 LISTING

Respondent Heartland Health Systems, Inc., a not-for-profit Missouri corporation, is the sole member (parent) of Heartland Hospital, which is also a Missouri not-for-profit corporation with East and West Campuses. There are no other corporate relationships in this case.

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STATEMENT OF THE CASE

Respondents incorporate by reference the factual statements in the opinions of the district court (Pet. App. B at A-16 – A-19) and the court of appeals (Pet. App. A at A-2 – A-6).

REASONS FOR DENYING THE WRIT

There are two threshold grounds for denying the writ that make it unlikely the Court would ever reach the

issues framed by petitioner. First, there was a well-recognized alternative ground – the intracorporate immunity doctrine – that the Eighth Circuit did not address, but that alone required judgment for the respondents. Second, the passage of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152, makes it unlikely that the exact questions raised by petitioner will arise again. In any event, the two issues petitioner does raise – that the courts below misapplied both the rule of reason and the summary judgment standard of *Eastman Kodak*[1] – lack merit, as does petitioner's passing allegation that a conflict exists among the Circuits.

I. The Intracorporate Immunity Doctrine Bars Petitioner's Section 1 Claims And Makes It Unlikely The Court Would Reach Petitioner's Issues

The intracorporate immunity doctrine was an alternative ground supporting the district court's grant of summary judgment.[2] This well-recognized doctrine, now adopted in three Circuits, supports the judgment below for respondents wholly apart from the issues raised by petitioner.

---

[1] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072 (1992).

[2] *See Willman v. Heartland Hosp. East*, 836 F. Supp. 1522, 1527 (W.D. Mo. 1993) (Pet. App. B at A-23). The Eighth Circuit found it unnecessary to reach this issue. *Willman v. Heartland Hosp. East*, 34 F.3d 605 (8th Cir. 1994) ("We need not decide whether a hospital can conspire with its medical staff, for even if we assume that the defendants had the capacity to conspire with their medical staffs, we conclude that Willman's section one claim fails." *Id.* at 610; Pet. App. A at A-8.

Petitioner attempted to find an antitrust conspiracy between the hospitals and their respective medical staffs to deprive him of his staff privileges. But the hospitals and the medical staffs are more properly considered a single economic entity when conducting peer review proceedings, so that no Section 1 violation could have occurred as a matter of law.

Section 1 of the Sherman Act does not prohibit unilateral conduct; there must be a "contract, combination . . . or conspiracy" between separate entities to support a violation. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). The Court in *Copperweld* reaffirmed that a corporation was incapable of combining or conspiring with its own officers or with its unincorporated divisions. *Id.* at 769-71. The Court was careful to note that "substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1." *Id.* at 773 n.21. Using this same "substance, not form" analysis, the Court extended the immunity doctrine to corporations and their wholly owned subsidiaries:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate acts are guided or determined not by two separate corporate consciousnesses, but one.

Id. at 771.

The clear majority of cases have held that the intracorporate immunity doctrine of *Copperweld* applies to bar Section 1 challenges to peer review proceedings. In one of the leading decisions, *Oksanen v. Page Memorial Hosp.*, 945

F.2d 696 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992), the *en banc* Fourth Circuit recognized that a hospital and its medical staff could not conspire in the peer review process:

> The decision to conduct the peer review process does not represent the sudden joining of independent economic forces that section one is designed to deter and penalize. "There are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and medical staff are not competitors." Far from being a competitor with the hospital, the medical staff was in fact a natural component of the hospital's management structure.

Id. at 703 (citations omitted).

Oksanen is in accord with decisions by both the Third and Sixth Circuits. *See Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 118 (3d Cir. 1988) (hospital cannot conspire with its medical staff), *cert. denied*, 489 U.S. 1078 (1989); *Nurse Midwifery Ass'n v. Hibbett*, 918 F.2d 605, 614 (6th Cir. 1990) ("[T]he intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff . . . "), *cert. denied*, 502 U.S. 952 (1991); *see also Weiss v. York Hosp.*, 745 F.2d 786, 817 (3d Cir. 1984) (hospital could not conspire with medical staff as a matter of law because, "with regard to these [peer review] decisions, the medical staff operated as an officer of a corporation would in relation to the corporation."), *cert. denied*, 470 U.S. 1060 (1985).

Here Missouri law required the respondent hospitals to use members of their medical staffs to conduct ongoing

evaluations of the quality of medical care. 13 Mo. C.S.R. 50-20.021(2)(C)(10) (1982). The medical staff bylaws at both hospitals required physicians who were members of the medical staffs to serve on "peer review committees" as that term is defined in Missouri's peer review statute, R.S. Mo. § 537.035(2) (1985). The individual physicians conducting peer review were thus effectively serving as the hospitals' agents or officers in evaluating the quality of medical care. These peer review proceedings were therefore conducted with a "complete unity of interest" between the hospitals and the individual physician defendants, and no conspiracy was possible. *See Copperweld*, 467 U.S. at 771; *Oksanen*, 945 F.2d at 703.

The respondent hospitals were not sufficiently separate from their medical staffs during peer review proceedings to support a Section 1 Sherman Act violation. The trial court properly granted summary judgment on this ground. 836 F. Supp. at 1522; Pet. App. B at A-23. This alternative ground supporting the judgment makes it unlikely that the Court would ever reach the issues now raised by petitioner.

II. The Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, Which Became Effective After The Events Giving Rise To The Present Suit, Makes Petitioner's Issues Inconsequential

There is a second reason why this case does not require the Court's attention. After the events giving rise to the present suit, Congress enacted the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (1986) ("HCQIA"). This Act makes it

unlikely that the issues raised by petitioner will arise again, at least in the unique factual circumstances presented here.[3]

The HCQIA grants immunity to medical professionals who, like respondents, engage in legitimate peer review proceedings. *See* 42 U.S.C. § 11111. The Eighth Circuit succinctly summarized the future effect of this Act, even as it recognized the Act could not retroactively apply to the present facts:

> Recognizing that the possibility of antitrust liability may impede effective peer review, Congress enacted the Health Care Quality Improvement Act of 1986. 42 U.S.C. §§ 11101-11152. The Act immunizes medical peer review from antitrust liability if the challenged action is taken "in the reasonable belief that [it] was in the furtherance of quality health care." *Id.* § 11112(a). We need not consider the impact of the Act on Willman's claims, for the Act was enacted after the events at issue in this case and is not retroactive.

34 F.3d at 611 n.3; Pet. App. A at A-9 n.3.

Future cases alleging antitrust liability based on peer review proceedings will probably turn on the immunity provisions of the HCQIA. Petitioner's issues are therefore not likely to recur. The Court should not devote its limited resources to such narrow questions.

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[3] Petitioner's effort to explain this fact-specific case consumes more than twelve pages in his petition.

III. The Eighth Circuit Did Not Misapply The Rule of Reason

Petitioner misconstrues the Eighth Circuit's opinion in the two issues he frames for the Court. The opinion below did not, as petitioner claims, show a "refusal to apply the Rule of Reason." Pet. Br. at 18. Far from rejecting the rule of reason, the Eighth Circuit simply recognized, as this Court has taught, that the range of permissible inferences from ambiguous evidence is limited in a Section 1 case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Petitioner makes much of the fact that the Eighth Circuit deemed it immaterial whether Dr. Willman was a competent physician. Petitioner essentially ignores the extensive analysis conducted by both courts below, an analysis that finds ample support in past precedent of this Court.

Petitioner's case was based entirely on circumstantial evidence. Simply because he was disciplined by peer review panels at two hospitals, petitioner sought to draw an inference of an antitrust conspiracy. But, as the Eighth Circuit recognized, the record at those peer review proceedings *supported* the decisions to discipline petitioner:

> Physicians who were not affiliated with the hospital defendants and who did not practice in St. Joseph and therefore did not compete with Willman agreed that in some cases Willman had rendered care that was below the acceptable standard. For example, Dr. Ben McCallister, a board-certified internist and cardiologist, reviewed the charts of nine of Willman's patients and found that three of these patients

> had received substandard care. Dr. Paul Koontz, a board-certified general surgeon, reviewed eight of Willman's charts and found that Willman's care was deficient in four cases. Dr. Alfred Gervin, who is board certified in general surgery, critical care medicine, and emergency room medicine, concluded that in twenty-three of the thirty-four charts that he had reviewed, Willman had either violated the acceptable standard of care or had rendered "terrible care." Dr. Kenneth Mattox, a board-certified general surgeon and thoracic surgeon, reviewed only the Fanning case and concluded that Willman's "lack of understanding of the potential ramifications to the patient, coupled with his actual mismanagement and mistreatment of the patient, demonstrate a careless and reckless disregard for the patient." Indeed, one of Willman's medical experts concluded that "some of the cases, you know, represent outer edges of what we perceive as standard of care."

34 F.3d at 611; Pet. App. A at A-9 – A-10.

The Eighth Circuit correctly noted that on this record the ultimate question was not whether Dr. Willman was a competent practitioner. The question was instead whether, in this antitrust case, a reasonable factfinder could infer the existence of a conspiracy from the defendants' participation in peer review proceedings, when the evidence at those proceedings disclosed legitimate medical reasons for disciplining Dr. Willman:

> Corrective action against a physician does not violate the antitrust laws if the physician's peer reviewers had legitimate medical reasons to believe that the physician provided substandard care. *Johnson*, 964 F.2d at 121 [*Johnson v. Nyack*

> *Hosp.*, 964 F.2d 116 (2d Cir. 1992)]. On the other hand, a factfinder may infer the existence of an illegitimate motive if the peer group's conclusions are so baseless that no reasonable medical practitioner could have reached those conclusions after reviewing the same set of facts.' *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 821 (11th Cir. 1990). "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Conduct that is as consistent with a lawful motive as with an unlawful motive, standing alone, does not support the inference of an antitrust conspiracy. *Id.*; *see also Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993). Although Willman submitted affidavits to the contrary, we conclude that the opinions of Drs. McCallister, Koontz, Gervin, and Mattox established that the peer group's conclusions were not so baseless as to permit the inference of improper motive. Accordingly, we conclude that the limitation and eventual termination of Willman's staff privileges, in light of the conflicting medical opinions regarding the acceptability of Willman's care, is as consistent with the lawful motive of promoting quality patient care as with an anticompetitive motive and therefore, without more, does not give rise to an inference of an antitrust conspiracy.

34 F.3d at 611; Pet. App. A at A-10 – A-11.

This was not a "refusal to apply the rule of reason." It was a straightforward application of existing antitrust precedent to a narrow factual setting. There was nothing

remarkable about the lower court's analysis that would require the Court's attention.[4]

IV. The Eighth Circuit Did Not Misapply The Standard For Summary Judgment

Petitioner also misconstrues the opinion below in arguing that the Eighth Circuit failed to apply the proper summary judgment standard. This argument wrongly assumes that the issue for resolution was whether petitioner was a competent physician.

As noted above, the issue on which summary judgment was granted was petitioner's antitrust claim, not the issue of whether petitioner provided competent medical care. Petitioner's reliance on broad pronouncements from the *Eastman Kodak* opinion cannot change this basic fact. Under *Matsushita*, petitioner had the burden of producing evidence to show that the inference of the antitrust conspiracy he sought to draw was reasonable. 475 U.S. at 588. As the Eighth Circuit correctly noted, however, petitioner failed to do this: his evidence was just as consistent

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[4] Petitioner also suggests in passing that the opinion below conflicts with the Third Circuit's opinion in *Miller v. Indiana Hosp.*, 843 F.2d 139 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988). This is incorrect. The court of appeals below never adopted an across-the-board "substantial evidence" test for evaluating all peer review decisions, as did the district court in *Miller*. *See* 843 F.2d at 142. Petitioner's own arguments, moreover, emphasize the factual discrepancies between *Miller* and the present case. *See* Pet. Br. at 25. In any event, the *Miller* court, like the Eighth Circuit below, expressly noted the potentially overriding impact of the HCQIA on future peer review cases. *See* 843 F.2d at 143 n. 4.

with the lawful, procompetitive goal of advancing quality patient care as it was with some alleged antitrust conspiracy. 34 F.3d at 611. Thus, "without more," petitioner's evidence "does not give rise to an inference of an antitrust conspiracy." *Id.*

The opinion below is not at odds with either *Eastman Kodak* or *Matsushita*. Petitioner's second point also does not warrant the Court's attention.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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Dated: February 24, 1995

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No. 94-1288

In The

Supreme Court of the United States

October Term, 1994

Charles R. Wellman, M.D.,
Petitioner,

v.

Heartland Hospital East, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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No. 94-1280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CHARLES R. WILLMAN, M.D.,
Petitioner,

v.

HEARTLAND HOSPITAL EAST, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

Respondents do not confront the defects in the Court of Appeal's analysis under the Sherman Act or in its application of summary judgment standards. Instead, Respondents contend that an inapplicable statute and an issue not reached by the Appeals Court — an issue on which a split of authority exists among the circuits — should preclude review of the issues presented by the petition. Neither of those concerns undermine the importance or vitality of the issues presented for review.

I. The Court Should Grant The Petition To Resolve The Proper Rule Of Reason Analysis Of Peer Review And The Appropriate Summary Judgment Standards Under *Kodak*.

Respondents defend the Court of Appeals' opinion only by misstating the issues Petitioner has presented for review and ignoring the Appeals Court's flawed antitrust analysis and Petitioner's evidence of conspiracy.[1] The Eighth Circuit misapplied the Rule of Reason by failing to consider the competitive impact of Dr. Willman's exclusion from the relevant market by assessing the quality of his care. But that decision is not unique. Other federal trial and appellate courts considering antitrust peer review cases routinely ignore the Rule of Reason as defined by this Court in *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978). *See* Starling, *Antitrust Defenses in Peer Review Cases*, 63 ANTITRUST L.J. 399, 408-09 (1995) ("*Peer Review*").

II. The Health Care Quality Improvement Act Does Not Diminish The Vitality Of The Issues To Be Reviewed.

The Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101-11152 ("HCQIA"), is not applicable to this case[2] and has not altered the required Rule of Reason analysis of antitrust challenges to medical peer reviews. HCQIA provides only limited immunity from antitrust damages. 42 U.S.C. §11111. It is not a bar to suit and does not shield peer reviewers from suits seeking an injunction under the antitrust laws. *Id.* Furthermore,

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[1] Respondents focus instead on the disputed opinions of their medical expert witnesses who Respondents retained for this litigation.

[2] HCQIA was enacted after the events at issue in this case and is not retroactive. Even if Dr. Willman's peer review did not predate HCQIA, his reviewers would not be entitled to HCQIA immunity because they were his competitors. *See* 42 U.S.C. §11112(b)(3)(A)(iii).

HCQIA provides damage immunity only if the peer review meets specific criteria, including that direct competitors did not participate in the peer review. *Id.* Accordingly, most future peer review antitrust cases will continue to involve the proper application of the Rule of Reason and will not implicate HCQIA. *See* Busey, *The View From The Summit: Jurisdiction and Beyond*, 60 ANTITRUST L.J. 725, 754-55 (1992).

A recent analysis of peer review decisions confirms HCQIA's limited impact on antitrust challenges to peer reviews. *Peer Review*, at 421-25. Of twenty cases accruing after the effective date of HCQIA, HCQIA's limited immunity was an issue in only eleven. *Id.* at 421. The defendants prevailed on HCQIA grounds in only five of those cases. *Id.* at 422.

III. The Intracorporate Immunity Doctrine Does Not Diminish The Vitality Of The Issues To Be Reviewed.

The bulk of Respondents' brief is consumed by a discussion of the intracorporate immunity doctrine. That issue was not addressed by the Court of Appeals. It would not apply to the conspiracy among the physician defendants who are individuals. Furthermore, as the Eighth Circuit noted, the circuits are divided on the doctrine's applicability to peer review proceedings. App. A at A-7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 13, 1995.